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THE
GRAND QUESTION, 1703

Concerning the

Bishops Right

To VOTE in

PARLAMENT

In Cases Capital,

STATED and ARGUED,

FROM

The Parliament-Rolls, and the
History of former Times.

Edward WITH Stillingfleet

An Enquiry into their Peerage, and
the Three Estates in Parliament.

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THE
GRAND QUESTION

Bill of Rights

STATED AND APPROVED

BY THE HOUSE OF COMMONS

IN PARLIAMENT ASSEMBLED

THE 11th DAY OF OCTOBER 1689

IN THE SECOND YEAR OF THE REIGN OF WILLIAM III.

AND THE FIRST YEAR OF THE REIGN OF MARY II.

BY THE HOUSE OF COMMONS

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THE CONTENTS.

CHAP. I.

THE Question *stated; and general*
Prejudices removed.

CHAP. II.

The Right in point of Law debated.
Concerning the Constitution of Clarendon,
and the Protestation II. R. 2.

CHAP. III.

The Precedents on both sides laid down;
those against the Bishops examined and an-
swered.

CHAP. IV.

The Peerage of the Bishops cleared; how
far they make a third Estate in Parla-
ment. Objections against it answered.

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CHAP. I.

The Question stated; and general Prejudices removed.

THE *Question* in debate, as it is stated by the *Authour* of the *Letter*, is, *Whether the Bishops may be present and Vote Judicially in Capital Cases, which come to be judged in Parliament, either in giving the Judgment it self, or in resolving and determining any circumstance preparatory and leading to that Judgment?* Letter p. 1.

For our better proceeding towards a *Resolution* of this *Question*, it will be necessary to take notice of some things granted on both sides, which may prevent needless disputes, and be of great use in the following Debate.

1. It is granted, *That the Bishops do sit in Parliament by virtue of their Baronies, and are bound to serve the King there. And one part of the Service due to the King there, is to sit in Judgment: for the Authour of the Book entitled, The Jurisdiction of the House of Peers asserted, proves* Lett. p. 93.

at large, *that the Right of Judicature belongs to the Barons in Parliament; and that the Lords Spiritual have a considerable share therein, appears by this passage, in the Title-page of that Book, translated into English.*

The Judgment of the Lords Spiritual and Temporal is according to the Use and Custom of Parliament.

The Use and Custom of Parliament is the Law of Parliament.

The Law of Parliament is the Law of England.

The Law of England is the Law of the Land.

The Law of the Land is according to Magna Charta.

Therefore the Judgment of the Lords Spiritual and Temporal is according to Magna Charta.

Some Right then of Judicature in Parliament the Bishops have by Magna Charta: which, whatever it be, is as much theirs by that Charter as any Right of Temporal Persons; and cannot be invaded or taken from them without breach of that Charter, any more then the Rights of the Lords Temporal, or of any other Persons whatsoever. But how far that Right doth extend, is now the thing in Question.

2. It is not denied, *that the Bishops do sit in Parliament by the same kind of Writs that other Barons do.* They are summon'd to advise and debate about the great and difficult Affairs of the Kingdom; *cum Prælati, Magnatibus & Proceribus dicti Regni nostri Angliæ colloquium habere & tractatum*; i. e. to joyn therein with the Bishops and other Lords of the Kingdom. So that by the King's *Writ of Summons* they are empower'd and requir'd to confer and treat of all the weighty Affairs that shall be brought before them. And no Instance is so much as offer'd to be produced of any *Writ* wherein the King doth limit and restrain the Bishops, any more then any other Lords of Parliament, as to any matter of Consultation, or Point of Judicature, belonging to that House. They have then by their *Writ of Summons* as good right to sit in all Cases, as in any: and since the other Lords by *their Writs* are summoned to advise with the Prelates in *all* matters that shall come before them, without limitation, it is not to be conceived how this can be done, if the Bishops in some of the most important Debates be excluded.

3. It is yielded, That if the House pro-

Lett. p. 3.
118.

ceeds in a *Legislative* way by passing *Bills of Attainder*, the Bishops have a Right to sit and Vote therein as well as other Lords : at these it is said , *that the Bishops are or should be all present at the passing of them, for then they act as Members of the House of Lords in their Legislative capacity.* But men do as certainly die that are condemned in the *Legislative*, as in the *Judicial* Way. Is not this then really as much a *Case of Bloud* as the other ? If the Bishops should give their Votes in the *Legislative* way to condemn a Person for Treason, and yet think they had not Voted in a *Case of Bloud* ; they would then indeed be like *Chancer's Frier*, mention'd by the *Authour* of the *Letter*, that would have of a *Capon the Liver*, and of a *Pig the Head*, yet would that nothing for him should be dead. Doth a *Bill of Attainder* cut of a man's Head without making it a *Case of Bloud* ? There can be then no objection now made against the *Bishops Right* from any *Canons* of the Church ; for those allow no such distinction of proceeding in the *Legislative*, or *Judicial* Way. And the late *Authour* of the *Peerage and Jurisdiction of the Lords Spiritual* doth grant, *that the Canons do prohibit the Bishops voting in Bills of Attainder,*

Lett. p. 66.

P. 21.

der, as much as in any Case whatsoever.

But we are not to suppose a Person of such abilities as the *Authour* of the *Letter*, would go about to exclude the *Bishops* from their *Right* of *Voting* in a *Judicial* way in *Cases Capital*, unless there were some great appearance of *Law* on his side; because he professes so great a *Desire* that *Right* may prevail; and that his design in writing was, to satisfy himself and others where that *Right* is. The discovery whereof is our present business. Yet before the *Authour* of the *Letter* comes to a close debate of the matter of *Right*, he lets fall some general *Insinuations* to create a prejudice in the Reader's mind, as to the *Bishops* meddling at all in *Secular Affairs*, as though it were inconsistent with their *Function*, and with some passages in the *Imperial Law*. And because men may sometimes doe more harm by what they tell us they will not say, then by what they do say; it will be fit to prevent the danger of such *Insinuations*, before we come to consider his *Arguments*. Lett. p. 2, 3.

1. The first is, that meddling at all in *Secular Affairs* seems to be the doing that which the *Apostles* declared they would not doe, viz. leave the *Word of God*, and serve *Tables*. But are all Persons of *Estates* now bound

bound to part with them, as the Christians then did? *The serving of Tables* was a full employment; and they who attended that Office were the Treasurers of the Church, to distribute to every one as they judged fit, out of the common Stock. Is it *no Service to God*, to doe Justice, and to shew Mercy? to attend upon the publick Affairs of the Kingdom, when they are called to it by their Sovereign? Or are all *Bishops* now in the same circumstances the *Apostles* were when the Christian Church was to be planted in the World, and so few persons as the 12 Apostles made choice of for that Work? Is there no difference to be made between a Church constituted and settled and incorporated into the Commonwealth, and one not yet formed, but labouring under great difficulties, and making its way through constant persecutions? May it not be as well argued, that *Bishops* are not to stay in one Countrey, nor to have any fixed habitation, because the *Apostles* passed from place to place preaching the Word of God? Doth not the *Authour* of the *Letter* himselfe confesse, that the *Clergy* are one of the *Three Estates of the Kingdom*? and by the *Act 8 Eliz. 1.* the *Clergy* are called one of the greatest States

States of this Realm. And is there not then great Reason, that those who are *the chief part of it*, as he confesseth the *Bishops* to be, should have a share in affairs that concern the whole Nation? And would it not seem strange to the Christian World, that *we* alone of all the *Kingdoms of Europe* should exclude the *Bishops* from having an equal Interest with the other Estates in Parliament? For it were easy to prove from unquestionable Testimonies, that as soon as the Christian Religion was well settled in any of these *Northern Kingdoms*, the *Bishops* were admitted into all the publick Councils: and have so continued to this day, where the Convention of the Estates hath been kept up; *Bohemia* onely excepted since the days of *Sigismond*.

I begin with *France*, where *Hincmarus* Hincmar. Epist. de Ordine Palatii. saith, *there were two great Councils every year: one of the States of the Kingdom, for ordering the Affairs of the ensuing year, and redressing of Grievances; and in these the Bishops were always present: and the other of the King's Council, which managed the intervening Affairs; and into this the chief of the Bishops were chosen.* It were endless to repeat the several Parliaments in *France* in the time of the *Merovingian*

gian and Caroline Race, where in Laws were passed, and the great Affairs of the Kingdom managed by the *Bishops, Noblemen*, and others. Those who have looked into the ancient *Annals* and *Capitulars* of *France*, cannot be ignorant of this. There is one thing remarkable to our purpose in the famous Council of *Frankford*, which opposed the Worship of Images so stoutly, viz. that after the matters of Religion were agreed, then, according to the Custom of that Age, the other Estates being present, they proceeded to other matters : and then *Tassilo* Duke of *Bavaria* was brought upon his Knees for Treason ; and the Cause of *Peter* Bishop of *Verdun* was heard, who was likewise accused of Treason, and there purged himself. Concerning both which Cases there are 2 *Canons* still extant among the *Canons* of that Council : and in another, the Bishops are appointed, by consent of the King, to doe Justice in their several Dioceses. And that they had not onely a share in the *Legislative*, but in the *Judiciary* part, appears by one of the ancient *Formula* in *Marculphus*, where it is said, that the King sate in Judgment *una cum Dominis & Patribus nostris Episcopis, vel cum plurimis Optimatibus*

Concil.
Franc. c. 3.
& 9.

Marculph.
Form. l. i.
c. 25.

tibus nostris; (vel, in the language of that Age, is the same with &c.) This was the *Palatine Court*, where *Bignonius* Not. in Marc. p. 287. saith the greater Causes were heard, the

King himself being present, (or the *Comes Palatii*,) *Episcopis & Proceribus adsidentibus*, the Bishops and Lords sitting in Judicature together with him. And this was not onely the Original of the Parliament of *Paris*, as a standing Court of Judicature; but the like in *England* was the true foundation of the Supreme Court of Judicature in the House of Peers. So that in the eldest and best times of *France*, after Christianity had prevailed there, neither consultation about publick Affairs, nor administration of Justice were thought inconsistent with the Function of Bishops.

In *Spain*, during the Gothick Power, all the great Affairs of the Kingdom, and even the Rights of their Princes, were debated and transacted by the greatest of the Clergy and Nobility together; as may be seen in the several Councils of *Toledo* Concil. Toledo. 4. c. 75. 5. c. 7. 6. c. 17. 8. in Pref. 12. c. 1. 17. c. 1. Cont. l. Toledo. 13. Council c. 2. in that time, in the case of *Suintilas*, *Senandus* and others. And in one of them it is said, that after they had dispatched matters of Religion, they proceeded *ad ceterarum Causarum negotia*, to the handling of other Causes. In the 13.

Council of Toledo, the *Case of Impeachments of Treason* is brought in ; and Rules set down for due proceedings therein. And yet from one of these *Councils of Toledo* it is, that all the stir hath been made in the *Canon-Law* about Bishops not being present in cases of blood.

In *Germany*, the first Laws that were ever published were those by *Lotharius II.* *in Comitibus Regni*, saith *Goldastus* ; and there were present 33 *Bishops*, 34 *Dukes*, 72 *Counts*, besides the *People*. And by the *Matriculation-Roll* of the *States* of the *Empire*, it appears what a great *Interest* the *Clergy* have preserved therein from the first times of the prevalency of *Christianity* there. And *Arumæus*, a considerable *Protestant Lawyer* of the *Empire*, saith, *the Bishops of Germany sit in a double capacity in the Diets, both as Bishops, and as Princes of the Empire.* And he commends the *prudence* of that *Constitution* with respect both to *Justice*, and the *Honour and Safety of Religion*.

Rer. Aleman.
To. 2.
Cod. Leg.
Antiq.
B. 362.

Arumæ. de
Comitiis
• 35. c. 4.
• 98.

Goldast. Bo-
hem. l. 5. c. 1.

For the *Kingdom of Bohemia*, *Goldastus*, a learned *Protestant*, saith, that there, as in all other well-constituted *Kingdoms* among *Christians*, there were 3 *Estates*, of *Prelats*, *Nobles*, and *Commons* ; and this continued, he saith, from
the

the time Christianity was received, till the days of Sigismund.

No sooner was Christianity received in Hungary, but their Princes, *Stephanus* Bonfini dec. 2. l. 1. and *Latisslaus*, called their great Councils of their *Prelats* and *Nobles*: and the Laws made in the *Concilium Zabolchianum* Decret. La. dist. p. 12. were passed by the *King*, with all his *Bishops* and *Nobles*, and with the consent of the *whole Clergy* and *People*.

In Poland, *Starovolscius* saith, that Starovolsc. 1. olon. p. 255. their *Ancestours*, after they received Christianity, out of regard to Religion, gave the *Bishops* the first place in the Senate; and admitted the Clergy to the great Offices of the Kingdom. And *Sigismund* in his Constitution saith, the States of Poland consist of the *Bishops*, *Barons*, and *Delegates*, called *Nuntii terrestres*. Herburt. Stat. Regni Pol. p. 263.

In the Northern Kingdoms, *Adamus* Adam. Brem. de situ Dan. n. 85. *Bremensis* saith, that the *Bishops*, after the People received Christianity, were receiv'd into their publick Councils. And *Loccenius* Loccen. Antiq. Sueco-Goth. c. 8. reckons up among the several Estates, the *Bishops*, *Nobles*, *Knights*, and *Deputies* of the Country and Cities. And it appears by the *Hirdstraa*, or the ancient *Laws of Norway*, the *Bishops* as well as *Nobility* were present in the Convention of the States, and all publick Councils. Jus Aulicum Norveg. c. 3. c. 36.

The

The like might be proved *here* in the *Saxon* times, from the Conversion of *Ethelbert* downward. This is so very evident, that he must blind his eyes that doth not see it, if he doth but cast them on the History of those times.

These things I have laid together with all possible brevity and clearness, that in one view we may see a consent of all these parts of the Christian World, in calling *Bishops* to their *publick Councils*, and most solemn Debates; and how far they were from thinking such Employments inconsistent with their Sacred Function, and charging them, that thereby *they left the Word of God to serve Tables*. Neither can this be looked on as any part of the Degeneracy of the Church, or the *Policy* of the *Papacy*; since, as the fore-cited *Arumæus* saith, *they were admitted to this honour before the Papal Power was advanced; and were so far from carrying on the Pope's designs, that they were, in most Countries, the greatest Opposers of them*. And when the *Popes* began to set up their Monarchy, their business was, to draw them off from meeting in these Councils, under several pretences of *Cases of Bloud*, and other things; the better to keep them in a sole Dependency on themselves.

As

As will appear by the following Discourse.

2. The next thing suggested is, that the Imperial Law doth forbid Clergy-men Lett. p. 3, 4. having any thing to doe with Secular matters. And for this a Rescript of Honorius and Theodosius is mentioned, and a Decree of Justinian. To which I answer,

1. The Imperial Edicts are not the Law of England. Our dispute is about a Right by our own Laws; which a Rescript of Honorius and Theodosius can neither give nor take away. What would become of the whole frame of our Government, and of our just Rights and Properties, if the producing of Imperial Edicts would be sufficient to overthrow them? When the Bishops once pleaded hard in Parliament in behalf of an Imperial Constitution, lately adopted into the Canon-Law, the Answer given by all the Temporal Lords was, *Nolumus leges Angliæ mutare, quæ huc usque usitatæ sunt & approbatæ.* Stat. Mer-
ton c. 9.
20 H. 3. They did not mean, they would make no alterations in Parliament, for that very Parliament did so in several things: but their meaning was, as Mr. Selden observes, that they owned neither Canon Dissert. ad
Flet. c. 9.
§ 2. nor Imperial Laws here, any farther then they were agreeable to the Laws of the Land.

2. The *Imperial* Constitutions do give liberty to Church-men to have to doe in Secular Affairs. The Emperour *Constantine*, whose Constitutions deserve as great regard as those of *Honorius* and *Theodosius*, to shew his respect to the Christian Religion, permitted all men to bring their Causes before the Bishops, without ever going to the other Tribunals, as *Sozomen*, a Lawyer of *Constantinople*, relates. And this is the true foundation of the Constitution *De Episcopali Judicio*; as *Gothofred* confesseth. Which is at large inserted into the *Capitulars*, with a more then usual introduction; and made a Law to all the Subjects of the Empire, *Franks, Saxons, Lombards, Britons, &c.* and therefore is more considerable to these parts then a bare Rescript of *Honorius* and *Theodosius*. And yet, these very Emperours, in a *Constitution* of theirs, do so far ratifie the Judgment of Bishops upon Trial by consent before them, that no Appeal doth lie from their Decree. What Rescript then is this of theirs which so utterly forbids Cleggy-men having any thing to doe with publick Functions, or things appertaining to the Court? I suppose that Constitution of *Honorius* is meant, which confines the Bishops

Soz. hist.
l. 1. c. 9.

Capitul. Ca.
rol. & Lu-
dov. l. 6.
c. 281. ed.
Lindenb.
c. 366. ed.
Baluz.

Cod. Just. de
Episc. Au-
dient. l. 1.
tit. 4. c. 8.

Bishops Power to what concerns Religion ; and leaves other Causes to the ordinary Judges and the Course of Law. But two things are well observed by *Jac. Gothofred* concerning this *Rescript* of *Honorius* : 1. that it is meant of absolute and peremptory Judgment without Appeal ; 2. that whatever is meant by it, not many years after, this *Constitution* was repealed by *Honorius* himself, and the Bishops sentence made as absolute as before. So that *Honorius* is clearly against him, if a man's second judgment and thoughts be better.

3. The practice of the best men in those Ages shews, that they thought no Law in force to forbid Church-men to meddle in Secular Affairs : as might be at large proved from the practice of *Gregory Thaumaturgus* and *S. Basil* in the East ; of *Silvanus* Bishop of *Troas*, of *S. Ambrose*, *S. Augustine*, and others of the greatest and most devout Church-men of those times. And *S. Augustine* was so far from thinking it unlawfull, that in his opinion *S. Paul* commanded the Bishops to doe it. *Constituit enim talibus Causis Ecclesiasticos Apostolus Cognitores*. And the learned *Gothofred* of *Geneva* saith, *Mos hic frequens & legitimus eundi ad Judices Episco-*

Cod. Theod.
l. 16.
tit. 11. c. 3.

Greg. Nyss.
et it. Greg.
Basil. in ep.
Socr. l. 7.
c. 37.

Ambros. de
Offic. l. 2.
c. 24.
Aug. ep. 147.
in Ps. 118.
conc. 24.

Jac. Goth.
in cod. Theod.
ad Extrav.
de Episc. ju-
dicio.

Episcopus. It was then a common and legal practice to go to Bishops as to their Judges. Which would never have been, if there had been a Law in force to forbid Bishops meddling in Secular Affairs.

Concil. Sardic. c. 7.

4. The Emperours still reserved to themselves the power of dispensing with their own *Rescripts*, and the *Canons* of the Church. Therefore the Council of *Sardica*, when it prohibits Bishops going to Court, excepts the Princes calling them thither. Upon which *Balsamon* hath this Note; that *although the Canons prohibit, yet if the Emperour commands, the Bishops are bound to obey, and to doe what he commands them*; without any fault either in the Emperour or them. And in other places he asserts the Emperour's power of dispensing with the strictest *Canons* against Church-mens meddling in Secular Affairs: Thence he saith, the *Metropolitan* of *Side* was chief Minister of State under *Michael Ducas*; and the Bishop of *Neocesarea* made the *Laws* of the *Admiralty* for *Greece*. And the *Glosse* upon *Justinian's Novells* observes, that Bishops may meddle with the Affairs of the Commonwealth, when their Prince calls them to it. And this is the present Case; for the

Balsam. in Can. 4. Concil. Chalced.

Auth. Col. lat. 1. tit. 6. Novell. 6. c. 2.

the Bishops are summon'd by the *King's Writ* to serve him in the publick Council of the Nation : and therefore no *Imperial Rescript*, if it were of force in *England*, could have any in this Case, which was allowed by the Imperial Laws themselves.

5. There is a great Mistake about *Justinian's Decree*. For the Bishops are not so much as mention'd in it ; but the *Defensores Ecclesiarum* ; who were *Lawyers*, or *Advocates* of the Church : as appears by a *Constitution* of *Honorius* ; where *Gothofred* proves they were not so much as in Orders. It is true, *Justinian* doth appropriate the *Probat of Wills* to the Master of his Revenue ; but the Law and Custom of *England*, as *Lindwood* observes, hath alter'd that *Constitution* : and which must we regard more, *Justinian*, or our own *Laws* ?

Justin. Cod.
l. 1. tit. 3.
c. 41.

Cod. Theod.
l. 16. tit. 2.
n. 38.

Lindwood
l. 3. de Testam.

I find one thing more suggested by way of Prejudice to the Cause in hand, viz. the *Common Law* of *England*, which hath provided a *Writ* upon a Clergyman's being chosen an Officer in a Manor, saying it was *contra Legem & Consuetudinem Regni, & non consonum*. The Argument had been altogether as good, if it had been taken from a Minister of a

Let. p. 4.

Parish not being capable of the Office of Constable ; and it had as effectually proved that Clergy-men ought not to meddle in Secular Affairs.

CHAP. II.

The Right in point of Law debated. Concerning the Constitution of Clarendon, and the Protestation 11 R. 2.

HAVING removed these general Prejudices, I now come to debate more closely the main Point. For the *Author* of the *Letter* undertakes to prove, that
 Lett. p. 68. *Bishops* cannot by *Law* give Votes in *Capital Cases* in Parliament. Which he doth two ways : 1. by Statute-Law ; 2. by Use and Custome, which he saith is Parliament-Law : and for this he produceth many Precedents.

I. For Statute-Law ; two Ratifications, he saith, there have been of it in Parliament ; by the *Constitutions of Clarendon*, and the 11 R. 2.

Let. p. 69. 1. The *Constitutions of Clarendon* ; which he looks on as the more considerable, because *they were not the enacting of new*

new Laws, but a declaration of what was before. And for the same Reason I value them too, and shall be content this Cause stand or fall by them.

The Constitution in debate is the 11th, which is thus repeated and translated in the Letter. Archiepiscopi, Episcopi, & universæ Personæ Regni qui de Rege tenent in Capite, habeant possessiones suas de Rege, sicut Baroniam, & inde Respondeant Justiciariis & Ministris Regis, & sequantur & faciant omnes consuetudines Regias: Et sicut ceteri Barones, debent interesse judiciis Curie Regis, quousque perveniatur ad diminutionem membrorum, vel ad mortem.

The Archbishops, Bishops, and all the dignified Clergy of the Land that hold of the King in Capite, shall hold their possessions from the King, as a Barony, and answer for their estates unto the King's Justices and Ministers, and shall observe and obey all the King's Laws: And together with the other Barons, they are to be present at all Judgments in the King's Courts, till it come to require either losse of Member or Life.

The Argument from hence he enforceth from the solemn Recognition and publick confirmation of these Constitutions,

Let. p. 71, 72.

and the *Oath* taken to observe them ; from whence he concludes this to be *Testimonium irrefragabile*, *An irrefragable and invincible Testimony*. And so I foresee it will prove, but to a quite contrary purpose from what he intended it.

The whole *Question* depends upon the meaning of the latter *Clause* of this *Constitution*. The meaning he gives of it is this, that *the Prelats of the Church should not be present at the Judgments given in the King's Courts when losse of Member or Life was in question*.

Lett. p. 61.

The meaning of it I conceive to be this, that the Bishops are required to be present in the King's Courts as other Barons are, till they come to give Sentence as to Dismembring, or loss of Life.

Whether of these is the true meaning is now to be considered : and that will best be discovered these three ways. 1. By the Occasion. 2. By the plain Sense of the words according to their true Reading. 3. By the subsequent Practice upon this *Constitution* in the Parliament at *Northampton* soon after.

1. By the *Occasion*. The *Authour* of the *Letter* assigns that Occasion for this Constitution, for which there is not the least colour ; viz. *That the Prelats of that*
time

time were ambitious of a kind of Omnipotency, (*in Judicature I suppose he means,*) and that to restrain their power of Judging Capital Cases this Constitution was made: and because this seemed to be a diminution of their Power, therefore Matt. Paris ranks it among the *Consuetudines iniquas*, the wicked Customs of the former times. For all which there is not the least shadow of Proof; besides that it is so repugnant to the History of those Times, that I can hardly believe a Person of so much Learning and Judgment, as is commonly said to be the *Authour* of the Letter, could betray so much unskilfulness in the Affairs of those Times. For this is so far from being true, that the *Bishops* did then affect such a Power of Judging in all Secular Causes, that they looked on their attendance in the King's Court in the Trial of Causes, as a burthen which they would fain have been rid of; because they accounted it a *Mark of Subjection* to the Civil Power, and contrary to that *Ecclesiastical Liberty*, or Independence on Princes, which from the days of Gregory VII. they had been endeavouring to set up. Which H. II. being very sensible of, resolved to tie them to the Service of their *Baronies*, and to an attendance

dance on the *King's Courts* together with *other Barons*. But lest they should pretend any force on their Consciences, as to the *Canons* of the Church, this *Constitution* doth not require, but suffers them to withdraw, *when they came to Sentence in matters of Bloud*. And that this was the true Occasion, I prove by these two invincible Arguments.

1. By the complaint which they made of the *Baronies*, as too great a mark of *Subjection* to the Civil Power. This is plain from *Matt. Paris* himself, to whom the *Authour* of the *Letter* refers: for when he speaks of *William the Conquerour's* bringing the *Temporalties* of the *Bishops* into the condition of *Baronies*, i. e. forcing them to hold them of him in *Chief* upon certain *Duties* and *Services*, he calls it *Constitutionem pessimam*, a most wicked Constitution; just as he calls the *Customs* of *Clarendon* *Consuetudines iniquas*, wicked Customs. And he adds, that many were banished rather than they would submit to that Constitution. For their Privileges were so great with the *Frank-almoign* they enjoy'd in the *Saxon* times, and their desires so hearty (especially among the *Monks*, who from *Edgar's* time had gotten into most *Cathedral Churches*) to advance

Matt. Paris
ad A. D.
1070.

vance the *Papal Monarchy*, that they rather chose to quit all, then to give up the *Cause* of the *Church's Liberty* by accepting of *Baronies*. Therefore *Matt. Paris* calls the *Rolls* that were made of the *Services* belonging to these *Baronies*, *Rotulas Ecclesiasticæ Servitutis*, the *Rolls of Ecclesiastical Slavery*; then which nothing could be more contrary to that *Ecclesiastical Liberty* which was then setting up by *Pope Hildebrand*. And to put this out of all dispute, *Petrus Blesensis*, a Name well known in this dispute, in that very *Book* where he complains of the *Bishops Hypocrisy* about *Cases of Bloud*, in being present at hearing and trying *Causes*, but going out at *Sentence*, complains likewise of their *Baronies*, as those which gave occasion to that *Hypocrisy*, and as *the marks of the vilest Slavery*. *Et in occasione turpissimæ Servitutis seipsos Barones appellant*. They may think it an honour to be called the *King's Barons*, but he accounts it *the greatest Slavery*; and applies that place of *Scripture* to them, *They have reigned, but not by me; they are become Princes, and I know them not*. Now *Pet. Blesensis* lived in the time of *H. II.* and knew the whole proceedings of the *Constitutions of Clarendon*, and was a zealous

*Pet. Bles. de
Institut. Episc.
p. 451.*

a zealous maintainer of *Becket's Cause*, or, which was all one, of *the Liberties of the Church*, as they call'd them, against the *Civil Power*.

2. By the fierce Contest between the *Civil* and *Ecclesiastical Power*, about the *Liberties of Church-men*. This was carried on from the time that *William I.* brought them into Subjection by their *Baronies* : his *Sons* stood upon the *Rights* of the *Crown* ; whilst *Anselm* and his Brethren struggled all they could, but to little purpose , till after the death of *H. I.* Then *Stephen*, to gratifie the great *Prelates* , by whose favour he came to the *Crown*, yielded all they desired : but he soon repented, and they were even with him for it. *Malmsbury* takes particular notice, that he yielded they should have their Possessions *free and absolute* ; and they promised onely a *conditional Allegiance* to him , as long as he maintained the *Liberties of the Church*. When *K. Stephen* broke the *Canons* , as they said, by imprisoning 2 Bishops, the *Bishop of Winchester* and his Brethren summon'd him to answer it before them in *Council* ; and there declared, that the King had nothing to doe with *Church-men* , till the *Cause* was first heard and determined by themselves.

Malmsbur.
hist. Novell.
p. 100. b.

selves. All his time, they had no regard
 to his Authority, when it contradicted
 their Wills: and when the Peace was
 made between *Him* and *H. II. Radul-*
phus de Diceto takes notice that the Power
 of the Clergy increased by it. In this
 state *H. II.* found things, when *Gul. Neu-*
burgensis saith, *the great business of the*
Church-men was to preserve their Liberties.
 Upon this the great Quarrel between *Him*
 and *Becket* began: this made the *King*
 search what the *Rights* of the *Crown* were
 which his *Ancestours* challenged; to these
 he was resolved to make *Becket* and his
Brethren submit. For this purpose the
Parlament was called at *Clarendon*, and
 after great debates the 16 *Constitutions*
 were produced; which were those the *King*
 was resolved to maintain, and he made
 the *Bishops* as well as others swear to ob-
 serve them. Now when the rest of them
 relate to some *Exemptions* and *Privile-*
ges which the *Church-men* challenged to
 themselves, about their *Courts*, *Excom-*
munications, *Appeals*, and such like, and
 which the *King* thought fit to restrain
 them in; (From whence in *Becket's E-*
pistles it is said, those *Constitutions* were
 framed *ad ancillandam Ecclesiam*, to bring
 the *Church* in subjection, as *Baronius* shews

Rad. de Di-
 ceto Imag.
 histor. p. 509.
 528.
 Gul. Neu-
 burg. l. 2.
 c. 16.

Bar. ad A.D.
 1164. n. 3.

out

Fitz-Sre-
phen vit.
7h. Beck.
M S.

out of the *Vatican Copy*. And Fitz-Stephen saith, All the *Constitutions* of *Clarendon* were for *suppressing the Liberty of the Church*, and *oppressing the Clergy*: I say, considering this,) is there not then great Reason to understand this 11th. *Constitution* after the same manner: viz. that notwithstanding K. Stephen's Grant, H. II. would make them hold by *Baronies*, and doe all the *Service of Barons* in the *King's Courts*, as other *Barons* did; and he would allow them no other *Privilege*, but that of *withdrawing when they came to Sentence in a Case of Bloud*? What is there in this sense, but what is easy and natural, and fully agreeable to the state of those Times? whereas there is not the least foundation for the pretence of the *Bishops* affecting to be present in all *Causes*, which the *King* must restrain by this *Constitution*.

This sense of it is not onely without ground, but is absolutely repugnant to all the *History* of that *Age*. For if this *Constitution* was intended to *restrain* the *Bishops* from trying *Causes of Bloud*, then the *Bishops* did desire to be present in those *Causes*, and the *King* would not suffer them. Whereas it is evident that the *Bishops* pretended scruple of Conscience from the

the *Canons*, that they could not be present ; but in truth stood upon their Exemption from the *Service of Barons*, which they call'd *Ecclesiastical Slavery*. And therefore that could not be the sense of the *Constitution*, to restrain them in that which they desired to be freed from, and which by this *Constitution of Clarendon* was plainly forced upon them against their wills. For *Lanfranc* had brought the *Canon* of the 11th. *Council of Toledo* into *England*, That no *Bishop or Clergyman* should condemn a man to death, or give vote in the *Sentence of Condemnation* : at which *Council* were present 2 *Archbishops*, 12 *Bishops*, and 21 *Abbots*. And before *H. II*'s time this *Canon of Toledo* was received into the *Body of the Canon-Law*, made by *Ivo, Burchardus, Regino*, and *Gratian* who lived in the time of *K. Stephen* : and when they saw such a *Canon* so generally received, is there not far greater Reason to think they desired to withdraw, then that they should press to be present, and the King restrain them? But the *Constitution* is so framed on purpose, to let them understand, that the King expected in all *Judgments* they should doe their *Duty*, as other *Barons* : but lest they should think he purposely designed

Spelm. Con.
cil. To. 2.
p. 8, 9, 11.

signed to make them break the *Canons*, he leaves them at *liberty to withdraw* when *Sentence* was to be given. So that I can hardly doubt but the *Authour* of the *Letter*, if he please calmly to reflect upon the whole matter, will see reason to acknowledge his mistake; and that this *Constitution* was so far from intending to restrain the *Bishops* from all *Judicature* in *Cases of Bloud*, that, on the contrary, it was purposely framed to oblige them to be present, and to act in such Causes as the *other Barons* did, at least till the Cause was ripe for *Sentence*: which last Point the King was content to yield to them, out of regard and reverence to the *Canons* of the *Church*. For the words of the *Law* are not words of *Prohibition* and *restraint* from any thing, but of *Obligation* to a *Duty*; which was, *to be present and serve* in the *King's Courts of Judicature*, in like manner as the *other Barons* did.

From all which it is evident, I think, beyond contradiction, that the *Occasion* of this *Law* was not *the Ambition of the Prelates*, (as the *Authour* of the *Letter* suggests) *to thrust themselves into this kind of Judicature*; but an *Ambition* of a worse kind, (though quite contrary)

viz.

viz. under a pretence of *Ecclesiastical Liberty* and *Privilege*, to exempt themselves from the *Service* of the *King* and *Kingdom*, to which by virtue of their *Baronies* they were bound, *sicut ceteri Barones*, as well as the other *Barons*. And therefore it is so far from being true, that the *Bishops* exercise of this *Jurisdiction* together with the *Temporal Lords* is a *Relique* of *Popery*, and one of the *Encroachments* of the *Clergy* in those *Times* of *Ignorance* and *Usurpation*, as some well-meaning *Protestants* are now made to believe; that, on the contrary, the *Exemption* of the *Clergy* from this kind of *Secular Judicature* was one of the *highest Points* of *Popery*, and that which the *Pope* and his *Adherents* contested for with more zeal then for any *Article* of the *Creed*. This was one of those *Privileges* which *Thomas Becket* said *Christ purchased for his Church with his blood*, and in the obstinate defence whereof against the *King* he himself at last lost his life. And now to put the matter beyond all doubt, I appeal to any man skill'd in the *History* of those *Times*, whether *Thomas Becket* opposed the *Constitutions* of *Clarendon* to the death, and broke the *Oath* he had taken to observe them, because by them (among other

C

things)

things) the *Bishops* were excluded from *Judicature* in *Cases of Bloud* ; or for the quite contrary reason , (among others) because this *Service* of the *King* in *his Courts* , impos'd on them by virtue of their *Baronies*, was look'd upon by him as a violation of the *Privileges* of the *Church*, and a badge of *Ecclesiastical Slavery*, which by all means he desir'd to cast off. And if the latter be the true Reason, I leave it to the impartial Reader , and even to the *Authour* of the *Letter* himself upon second thoughts, whether he have not widely mistaken both the *Occasion* and *Meaning* of this Law.

2. Let us consider the plain *Sense* of the *words* according to the *true reading* of them. The *Authour* of the *Letter* hath made use of the most imperfect *Copy*, viz. that in *Matt. Paris* ; I cannot tell for what reason , unless it be that in the last *Clause* [*in Judicio*] is there left out , which is put in in the *Copy* extant in *Ger-vase*, and in the *Vatican Copy*, and in several *MSS.* in all which it runs thus, *Et sicut Barones ceteri debent interesse judicis Curie Regis cum Baronibus, usque per-
veniatur in iudicio ad diminutionem membrorum, vel ad mortem.* Now here are two things to be distinguished.

1. Some-

1. Something expressly required of the Bishops as to their presence in the King's Courts, viz. that they must attend as other Barons, and sit together with them: and therefore it is expressed twice; *Et sicut ceteri Barones*, in the beginning of that Clause, and *cum Baronibus*, again after, and *debent interesse*, in the middle. And can any one soberly think, that the meaning of all this is, they must not be present in cases of Blood? No: the Constitution saith, they ought to be present as other Barons, and sit with other Barons in the Trials of the King's Courts. And yet the Authour of the Letter doth (to speak mildly) very unfairly represent this Constitution, as if it did forbid the Prelats to be at all present in the Judgments of the King's Courts in Cases of Blood; and that in exprefs words. For, speaking of the Constitutions of Clarendon, he hath this passage, *And one of these Con-* pag. 61.
stitutions was, that the Prelats of the Church should not interesse Judiciis Curie Regis, be present at the Judgments given in the Kings Courts. Whereas this Constitution (as he himself cites it afterwards) runs thus, debent interesse Judiciis Curie Regis, quousque, &c. they ought to be present in the Judgments of the King's Courts, till it come to loss of

Baronius ad
Ann. 1164.

Members or Life. So that this *Law* expressly says, that *they ought to be present in the Judgments of the King's Courts, till it come, &c.* And when it comes to loss of *Members or Life*, it doth not say (as the *Authour* of the *Letter* affirms) that *they should not be present* then, nor do the words of the *Constitution* imply any such thing; but only require (as I shall evidently make appear) their presence so far; and when it should come to *Sentence*, leaves them at liberty to withdraw in obedience to the *Canons* of the Church, which they pretended themselves bound in Conscience to observe. And this is the true Reason why, among the 16 *Constitutions* of Clarendon, (whereof 10 were condemned, 6 tolerated, but none approv'd, by Pope Alex. III.) this 11. was one of the 6 which escaped with an *Hoc toleravit*, this the Pope was content to tolerate; because in the last *Clause* of it there was regard had to the *Canons* of the Church. Of this misrepresentation of the *Constitution* under debate, though it might have deserved a more severe animadversion, I shall say no more, because I have no design to provoke the *Authour* or any body else, but onely to convince them.

2. Something allowed to the *Bishops* as peculiar

peculiar to themselves, *viz.* That when the *Court* hath proceeded so far *in judicio*, in a particular Trial, (for before it is *Judicis* in general) that Sentence was to be given either as to dismembring, or loss of life, then they are at liberty; but till then they are required. As, suppose *Charles V.* had required the *Protestant Princes* to attend him to *Masse*, as other *Princes* did; onely when the *Masse-Bell* tinckled they might withdraw; would not any reasonable man understand by this, that they were obliged to their Attendance till then? So it is here: the *King* commands their Attendance till it comes to such a point; therefore before it comes thither, their presence is plainly required by this *Constitution*. And so in stead of there being a *Statute-Law* to exclude the *Bishops* at such *Trials*, there is one to require their presence *in judicio*, in the proceedings of such a *Trial*, till it comes to Sentence. All that can be said in this case is, that the last Clause is not to be understood of the Sentence, but of the Kind or quality of the Cause; i. e. they are to be present in the *King's Courts*, till they come to a Cause wherein a man's Life or Members are concerned. But that this cannot be the meaning will appear.

1. There is a great deal of difference between *quousque perveniatur ad iudicium mutilationis membrorum, vel mortis*, that might have been understood of a *Cause of Bloud*; and *quousque perveniatur in iudicio ad mutilationem membrorum, vel ad mortem*, for this supposeth a Trial already begun, and the Bishops present so far in it; but when it comes to the point of *mutilation* or *death*, then they have leave to withdraw. So that this last *clause* must either be understood of *Execution*, which no one can think proper for the *King's Courts*; or for the *Sentence* given by the *Court*, which is most agreeable.

2. The Sense is best understood by the Practice of that *Age*. For, if the meaning of the *Constitution* had been, they must not be present in any *Cause of Bloud*, and the *Bishops* had all sworn to observe it; can we imagine we should find them practising the contrary so soon after? And for this I appeal to *Petrus Blesensis*, whose words are so material to this purpose, that I shall set them down. *Principes Sacerdotum & Seniores Populi, licet non dicent iudicia sanguinis, eadem tamen tractant disputando & disceptando de illis; seque ideo immunes à culpa reputant, quod mortis aut truncationis membrorum iudicium decernentes,*

nentes, à pronuntiatione duntaxat & executione pœnalis sententiæ se absentent. Whereby it is evident that the *Bishops* were present at all Debates, and gave *Votes in Causes of Bloud*; but they absented themselves from the *Sentence*, and the *Execution* of it. It is true, *Pet. Blesensis* finds fault with them for this. But what is that to the *Law*, or to the practice of that Age? I do not question, but *Pet. Blesensis* condemned the observation of the other *Constitutions* of *Clarendon*, as well as this; and in all probability this passage of his was levelled at those *Bishops* who did observe this 11. *Constitution*.

3. We have a plain way to understand the meaning of this *Constitution*, by what happen'd soon after in the *Parlament* at *Northampton*, which was summon'd upon *Becket's* Obstinacy and Contempt of the *King's* Authority: where *Fitz-stephen* saith, *he was accused of Treason*; and the *Bishops* sate together with other *Barons*; and because it did not come to a sentence of Death, after great debate between the other *Lords* and the *Bishops* about pronouncing the *Sentence*, the *Bishop* of *Winchester* did it. Wherein we have as plain evidence as can be desired, that the *Bishops* did sit with the other *Barons*, and

vote with them in a case of Treason.

To this Precedent the Authour of the Letter answers several things.

Lett. p. 60.

pag. 62.

Vol. Epistol.
Becket in
Bibl. Cotton.
MS. I. I.
ep. 65.

Ep. 52.

Gervaf. Chron.
nic. p. 1391.

I. That none of the ancient Historians of those Times say any thing of his being accused of Treason : and therefore he thinks one may modestly affirm, that it was a mistake in Fitz-stephen to say so. But what if H. II. and Becket himself both confess that he was charged with Treason ? H. II. in his Letter to Reginaldus saith, that by consent of his Barons and Clergy he had sent Ambassadors to Pope Alexander, with this Charge, that if he did not free him from that Traitour Becket, he and his Kingdom would renounce all Obedience to him. And Becket did not think this a bare term of reproach ; for in one of his Letters he saith, that defending the Liberties of the Church *læsæ Majestatis reatus sub persecutore nostro est*, was looked on as Treason by the King. And even Gervase himself, to whom the Authour of the Letter appeals, saith, some of his friends came to him at Northampton, and told him, if he did not submit to the King, he would be proceeded against as a Traitour, for breaking the Allegiance he had promised to the King, when he did swear to observe the ancient Customs at Clarendon. And

Fitz-

Fitz-stephen saith, the King's Council at Clarendon said it was Treason, or taking the King's Crown from his head, to deny him the Rights of his Ancestours.

*Fitz-stephen
Vir. Th. Bec-
ket. de Con-
cilio apud
Clarendon.*

Lett. p. 63.

2. That it was a strange kind of Treason Becket was charged with at Northampton, viz. for not coming when the King sent for him; which at the most was onely a high Contempt; and Fitz-stephen, who was a Creature of the Archbishop's, might represent it so, to draw an odium on the King. And therefore he looks on this as a weak precedent for the Bishops to lay any weight upon, being at best out of a blind MSS. of an Authour justly suspected of partiality, against the tenour of all the ancient Writers that give an account of the same business. What truth there is in this last suggestion appears in part already, and will do more by what follows. Must all the unprinted Records be answered with saying they are blind MSS? I cannot but take notice how unreasonable a way of answering this is. It is like turning of that pressing Instance, of the Bishops making a Proctor in Capital Cases, by saying it was Error temporis; which because it will answer all Instances whatsoever as well as that, is therefore an answer to none. Just so it is equally an answer to all MSS,

pag. 79.

to

to say they are *blind* ; and to all *printed Books* too, because they were once *MSS*, and, for any thing that appears to the contrary, as *blind* as *Fitz-stephen's*. For surely no authority is added to a Book by its being printed ; unless in the opinion of the common people, who are said to *take all for true that is in Print*. I do not go about to parallel *Fitz-stephen* with *Parlament-Rolls* ; but I say, his Authority is very good, being present upon the place, and the best we have, of all the proceedings in the *Parlament* at *Northampton*. And if the *Authour* of the *Letter* had taken the pains to peruse him, he would not have contemned the *Precedent* drawn from thence ; which being so near the *Parlament* at *Clarendon*, (that, as himself confesseth, the *one* was in *February*, the *other* in *October* following,) it giveth the best Light into this matter of any thing in that Age ; and being not yet fully printed, it will be worth our while to set it down. Mr. *Selden* hath indeed printed very exactly the Proceedings of the *first Judgment* upon *Becket*, about the Cause of Contempt, for not coming upon the *King's Summons*, at the complaint of *John the Marshall* ; wherein the *Bishops* did certainly sit in Judgment upon

pag. 61.

Titles of Honour, p. 2.
c. 5. n. 20.

upon him with the other *Barons* : but there is a farther strength in this *Precedent*, not yet taken notice of. Which is, that after this *Judgment* passed, *Becket* behaved himself with so great insolency towards the *King* and the *Bishops*, upon the *King's* calling him to farther account, for many other things laid to his Charge, as *diverting the King's Treasure*, and applying it to his own use, and great *Accounts to the King while he was Chancellor*, &c. that the *King* required him to stand to the *Judgment* of his Court. *Becket* gave a dilatory Answer : the *King* summons the *Bishops*, and *Earls* and *Barons*, to give *Judgment* against him : the *Bishops* tell the *King*, *Becket* had appealed to the *Pope*, and prohibited them to give any farther *Judgment* upon any Secular Complaint against him. Whereupon the *King* sent some *Earls* and *Barons* to him, to expostulate the matter, since he was the *King's Subject*, and had so lately sworn to the *Constitutions* at *Clarendon* ; and to know whether he would give Security to the *King* about making up his *Accounts*, and stand to the *Judgment* of his Court. *Becket* refuseth to give answer to any thing, but the *Cause* of *John the Marshall*, for which he was summoned to appear ;
flights

flights his Oath, as contrary to the *Rights of the Church*, and confirms his *Appeal to the Pope*. And such an owning of the *Pope's Power*, in derogation to the *Rights of the Crown*, Sir Edward Cook saith was *Treason by the ancient Common Law*, before any Statutes were made. However, the *King* charges the *Bishops* by virtue of their *Allegiance*, that, together with the *Barons*, they would give Judgment upon the *Archbishop*. They excused themselves on the account of the *Archbishop's Prohibition*. The *King* replied, That had no force against the *Constitution of Clarendon*, so lately made and acknowledged by them. The words of Fitzstephen are these: *Rex, responsò Archiepiscopi accepto, instat Episcopis, præcipiens & obtestans per homagium & fidelitatem sibi debitam & juratam, ut simul cum Baronibus de Archiepiscopo sibi dictent sententiam. Illi se excusare cœperunt per interpositam Archiepiscopi Prohibitionem. Rex non acquievit, asserens, quòd non teneat hæc ejus simplex Prohibitio contra hoc quòd Clarendonæ factum & initum fuerat.* So that *H. II.* in the *Parlament at Northampton* declared, that *Bishops* were bound, by virtue of the *Constitution of Clarendon*, to be present, and to give their *Votes* in cases

cases of Treason. And the *Bishops* did not deny this, but used prudential arguments to dissuade the *King* from proceeding any farther, the *Appeal* being made; and that it was for the good of *King and Kingdom*, for them to submit to the *Prohibition*. And the *Bishop of Chichester* told *Becket*, he made them go against the *Constitutions of Clarendon*, which they had so lately sworn to observe; in these remarkable words; *Quo contra nos venire compellitis, interdicendo, nè ei quod de nobis exigit adesse possimus* *Judicio*. By which we see this *Constitution* is indeed an *irrefragable Testimony*; but it is to prove that *Bishops* are bound to be present even in *Cases of Treason*, when the *King* summons them. And as to the case of *Becket's Treason*, the same *Bishop* told him, it lay in breaking his *Oath* about those *Constitutions*, wherein the *Rights of the Crown* were declared. And if this be not *Treason* by the *Common Law*, *Sir Edward Cook's Preface* to his fifth *Book of Reports* signifies nothing.

The late *Authour* of the *Peerage and* pag. 14.
Jurisdiction of the Lords Spirituall
 takes it for granted, that by the *Constitution of Clarendon* the *Jurisdiction*
 of *Bishops* was limited, that it should
 not

not extend *ad diminutionem membrorum, vel ad mortem*. But the foregoing discourse hath, I suppose, made it evident, that those words contain no *Limitation*, but a *Privilege* or *Indulgence* to them with respect to the *Canon-Law*. And he takes very needless pains to prove this to be *declarative of the Common Law*; and that the Meeting at *Clarendon* was a full Parliament: which are very much besides the business.

All that looks towards this matter, is, that he saith, this Statute was confirmed by a Council at *Westminster*; for which he cites *Rog. Hoveden's* Authority. But I wish he had produced the *Canon* entire as he there found it; for then the sense of it would have been better understood. In this Synod at *Westminster*, *Richard Archbishop of Canterbury* produceth several ancient *Canons*, which he thought fit to be observed here. Among the rest, he mentions that of the Council of *Toledo*. The words are these: *His qui in Sacris Ordinibus constituti sunt, judicium sanguinis agitare non licet*; here he makes his *&c.* and leaves out the *Prohibition* which declares the meaning and extent of this *Canon*: *Unde prohibemus, nè aut per se membrorum truncationes faciant, aut*
infe-

inferendas judicent ; Wherefore we forbid them, either to dismember any persons themselves, or to give Judgment for the doing of it. Both which were practised in Spain in the time of the Council of Toledo, which was the occasion of this Canon. And then follows the Sanction of Deprivation if men did otherwise. And what now doth this signifie more to the Constitution of Clarendon, then that the same Canons were now revived, which gave the occasion to that permission of withdrawing, when the Sentence came to be pronounced as to dismembring, or loss of Life ?

But he urges farther about this Consti- pag. 18.
tution, that it must be so understood, as to exclude the Bishops from all antecedent and preliminary things which do relate or tend ad diminutionem, &c. or else, saith he, it must be onely the exemption of the Prelats from doing the Office of Executioners, which is Non-sense. Why so ? though it be not the whole sense of the Canon, yet surely it is sense. But he might have thought of giving Sentence, which the Canons forbid, and is different from Execution, and doth not exclude the Bishops presence at Preliminaries. The Constitution of Westminster, he saith, is plainer, *Non debent agitare judicium sanguinis* ;

guinis ; which, he saith, excludes the exercise of any Judicial Power in Cases of *Bloud*. Whereas it appears by the *Prohibition* there extant, nothing is forbidden but *giving Sentence* ; at which the *Constitution* of *Clarendon* allows them to withdraw.

Lett. p. 73.

2. The second time we are told that the Exclusion of the Bishops in Cases Capital received a Confirmation in Parliament, was the 11. of R. II. when the Archbishop and the other Bishops, upon their withdrawing then from the Parliament, in regard matters of *Bloud* were there to be agitated and determined, in quibus non licet alicui eorum personaliter interesse, as they say, in which it was not lawfull for any of them to be present in person, did therefore enter a Protestation, with a *Salvo* to their Right of Sitting and Voting in that and all other Parliaments, when such matters were not in Question : which Protestation of theirs was at their desire enrolled in full Parliament by the King's Command, with the Assent of the Lords Temporal and Commons. So that it is here said to be a perfect and compleat Act of Parliament ; and if it had not been a Law before, would then have been made one. This is the substance of what is more largely insisted

sisted on in another place; and what strength is there added shall be duely considered.

To understand this business aright, it will be necessary to set down the *Protestation* it self at large, as it is taken out of *Courtney's Register*, and the *Parlament-Rolls*; and then examine the *Points* that do arise from thence. The *Protestation* runs thus.

Rot. Parl. II
R. 2. n. 9.

In Dei nomine Amen. Cùm de jure & consuetudine Regni Angliæ, ad Archiepiscopum Cantuariensem, qui pro tempore fuerit, necnon cæteros suos Suffraganeos, Confratres & Coëpiscopos, Abbatesque & Priores, aliósq; Prælatos quoscunque, per Baroniam de Domino Rege tenentes, pertineat in Parliamentis Regis quibuscunque, ut Pares Regni prædicti, personaliter interesse, ibidemque de Regni Negotiis, & aliis ibidem tractari consuetis, cum cæteris dicti Regni Paribus, & aliis ibidem jus interfendi habentibus, consulere, tractare, ordinare, statuere, & diffinire, ac cætera facere quæ Parlamenti tempore ibidem imminent facienda; in quibus omnibus & singulis, Nos Willielmus Cantuar. Archiepiscopus, totius Angliæ Primas, & Apostolica sedis Legatus, pro nobis, nostrisque Suffraganeis, Coëpiscopis, & Confratribus,

bus, nec non Abbatibus, Prioribus, ac Præ-
 latis omnibus supradictis, protestamur, &
 eorum quilibet protestatur, qui per se, vel
 per Procuratorem hîc fuerit modò præsens,
 publicè & expresse, quòd intendimus, &
 intendit, volumus, ac vult quilibet eorum,
 in hoc præsentì Parlamento, & aliis, ut
 Pares Regni prædicti, more solito interesse,
 consulere, tractare, ordinare, statuere, &
 diffinire, ac cætera exercere, cum cæteris jus
 interessendi habentibus in eisdem, statu &
 ordine nostris & eorum cujuslibet in omni-
 bus semper salvis. Verùm quia in præsentì
 Parlamento agitur de nonnullis materiis in
 quibus non licet nobis, aut alicui eorum,
 juxta Sacrorum Canonum instituta quo-
 modolibet personaliter interesse, ea prop-
 ter pro nobis & eorum quolibet protestamur,
 & eorum quilibet hîc præsens etiam prote-
 statur, quòd non intendimus, nec volumus,
 sicuti de jure non possumus, nec debemus,
 intendit, nec vult aliquis eorundem, in præ-
 senti Parlamento, dum de hujusmodi mate-
 riis agitur, vel agetur, quomodolibet in-
 teresse; sed nos, & eorum quemlibet, in ea
 parte penitus absentare, jure Paritatis &
 cujuslibet eorundem interessendi in dicto
 Parlamento, quoad omnia & singula mihi
 exercenda, nostris & eorum cujuslibet sta-
 tu & ordine congruentia, in omnibus sem-
 per

per salvo. Ad hæc insuper protestamur, & eorum quilibet protestatur, quòd propter hujusmodi absentiam, non intendimus, nec volumus, nec eorum aliquis intendit vel vult, quòd processus habiti & habendi in præsentì Parlamento super materiis antedictis, in quibus non possumus, nec debemus, ut præmittitur, interesse, quantum ad nos & eorum quemlibet attinet, futuris temporibus quomodolibet impugnentur, infirmentur, seu etiam infringentur.

This Protestation, setting aside the legal Formalities of it, consists of 3 parts. 1. A Declaration of their undoubted *Right as Peers of the Realm*, by virtue of their *Baronies*, to Sit and Vote in all Debates of Parliament. 2. Of their intention to withdraw this Parliament, because several matters were to be handled, at which it was not lawfull for them, according to the *Canons*, to be present. 3. That by this absènting themselves they did not intend, as far as concerned them, to null the proceedings of that Parliament.

Here now arise three main Points to be discussed.

1. Upon what Grounds the Prelats declared, it was not lawfull for them to be present in Parliament, at such matters?

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2. How far the *Parlament's* receiving that *Protestation* makes it a *Law* ?

3. Whether on supposition it were a part of *Canon-Law* then in force, it continues so still since the *Reformation* ?

1. Upon what Grounds they declared it unlawfull for them to be present in *Parlament*, at such matters ? One would think the very reading the *Protestation* were sufficient to convince any man ; for the *Bishops* declare as plainly as men could do, that it was out of regard to the *Canons of the Church*, and not from any *Law of the Land*. For how was it possible that the same men should declare, that by reason of their *Baronies* they had full *Right* to be personally present in all Debates of *Parlament*, if there were some *Law* in force which made it unlawfull for them to be personally present ? The greater force there is in the *Protestation's* being receiv'd in *Parlament*, the greater strength there is in this Argument. For if the *Protestation's* being allowed by *King, Lords and Commons*, make it (as the *Authour* of the *Letter* affirms) a perfect and compleat *Law*, then their *Right* to be present in all Debates of *Parlament* is a *Law* ; and so much the more considerable, because it is no enacting *Law*,
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making that to be so, which was not before, but declarative of what was confessed to be their *undoubted Right by King, Lords and Commons*. And therefore I do not wonder, that the *Authour* of the *Letter*, so conveniently to his purpose, left out all the beginning of the *Protestation*, which so fully clears the sense of the rest. For the very samething which afterwards the *Bishops* say they are forbid to doe by the *Canons*, that is, *personaliter interesse, to give their personal attendance*, they say at first, by *Right* of their *Peerage*, as *Barons by tenure*, did belong to them; for there the words are *personaliter interesse* too. Therefore *that* personal attendance in such matters which they said was unlawfull to them by the *Canons*, they challenge to themselves as their just *Right* by virtue of their *Baronies*. But is it possible to imagine, if they had been precluded from sitting by any antecedent Law, that ever such a publick avowing their *Right* would have passed the *King* and both *Houses*? So unsuccessfull hath the *Authour* of the *Letter* been in his *Statute-Laws*, that there can be no stronger evidence of the *Bishops Right* to sit in such *Cases*, then those which he produceth against them.

Lettr. p. 21,
22.

Const. C-
thob. c. N^o
Clerici.

Spelman.
Conc. To. 2. p.
183. p. 451.
Lyndwood
ad tit. de Loc.
& cond. c.
vendes. Si
quis Clericus.

But he goes about to prove this *Prohibition* cannot be understood *onely* of the *Canon-Law*: for the *Canon-Law*, saith he, was to them above all *Laws*; and what was forbidden by that *Law*, they could not have a thought, that it could in any sort be lawfull for them to challenge as their *Right*, upon any account. I confess I can see no force in this Reasoning: For when a thing is forbidden to men meerly by a *positive Law* of the *Church*, and the *penalty* of it is bare *Irregularity* by the *Canons*; why may not such men challenge their own *Right* notwithstanding those *Canons*, because the *Irregularity* might be dispensed with, when the *Pope* saw convenient? And by the *Constitutions* of *Othobon*, which were made in the time of *H. III.* we find, that if an *Inferiour Clergy-man* transgressed this *Canon*, it was in the power of the *Diocesan* to absolve him from his *Irregularity*. And this *Canon* was receiv'd and inforc'd most here in *England* on the *inferiour Clergy*, as appears by the *Canons* of *Stephen Langton* in the *Council of Oxford*, and other *Synodall Constitutions* here. For it is a *Rule* in *Lyndwood*, *Clericus ex vi verbi non comprehendit Episcopum, sed cum adjuncto, sic in quantum illud adjunctum potest concernere Episcopum.*

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That by *Clerici* we are not to understand Bishops, unless there be some adjunct that implieth it. And among the *Decretals* there is one from *Alexander III.* to the *Archbishop* of *Canterbury*, under the Title *Ne Clerici*, to the same purpose. Where the *Glosse*, I grant, comprehends *Prelats*; therefore I will not deny, but they were to be irregular by the *Canon-Law*, as well as others. But then, we are to consider, how far the *Legatine Power* vested in the *Archbishop* of *Canterbury* might extend in such a *Case*; and that there was the same severity in the *Canons* against *Clergy-men's* taking upon them any *Secular Office*: and yet in this very *Parlament*, *Thomas Arundell Bishop* of *Ely* was *Lord Chancellour*, and after him *William of Wickham Bishop* of *Winchester*, and before them *R. Baybroke Bishop* of *London*; and the *Bishops* of *Durham* and *Exceter* were *Lords Treasurers* under *R. II.* and in *H. III's* time we find 3 *Clergy-men Lords Chief Justices*, *Patesbull*, *Lovell* and *Mansell*, notwithstanding these *Canons*; and in *Edward III's* time almost all the great *Offices* of the *Court* were executed by *Clergy-men*. By which we see they did not think themselves so strictly bound to observe those *Canons*; or it was so easy to be

*Decretal. l. 3.
tit. 50. c. 5.*

dispensed with, that they had great Reason to insist upon the challenge of their own *Right*, notwithstanding the *Canon-Law*.

The truth is, the *Canon-Law*, as it was managed in those days, was one of the most mysterious pieces of *Ecclesiasticall Policy*: it was an *Engine*, which the artificial *Church-men* could screw up or let down as they pleased. If it were in a matter likely to be prejudicial to their interest, (as it was most apparently the case in 11 R. II. when matters grew so high between R. II. and the *powerfull Lords*, and so many *Favourites* were to be impeached, and among them *Alexander Archbishop of York*,) then it was a time to quote the *Canons*, and to enter a *Protestation*, and to withdraw: If the Times were calmer and more settled, or some great Reason moved them, then they could stick to their *Right of Peerage*, and make use of it, either in *Person*, or by *Proxy*, as they thought convenient. Nor was it so easy a matter to resolve what was *Canon-Law* in *England*, but they might with some colour make use of either of these *Pleas*. For in this very *Parlament* 11 R. II. the *Commons* desire that those may be reputed *Traitours* who brought
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in the *Pope's Bulls* of *Volumus* & *Imponimus* : which shews that they did not think all *Canon-Law* that passed for such at *Rome*. And 15 R. II. Sir *Will. Brian* was sent to the Tower, for bringing a *Bull* from *Rome* which was judged prejudicial to the *King*, and derogatory to his *Laws*. And in 16 R. II. *Will. Courtney*, *Archbishop* of *Canterbury*, (the same who enter'd the *Protestation* before mentioned,) makes another of a different kind, owning the *Rights* of the *Crown* in opposition to the *Pope's Encroachments*. Now, by the same Reason, no *Canon* made at *Rome*, no *Legatine* or *Synodal Constitutions*, could have any force against the *King's Authority*. But the *King* himself being under a force at that time, as he alwaies declared afterwards, and that being, as *Knighton* saith it Knighton p. 2701. was called, *Parlamentum sine Misericordia*, the *King* having tied himself up, not to pardon any without consent of the *Lords*; he might be willing to let the *Bishops* excuse themselves; because that might give some colour to call in question the *Proceedings* then, as it did 21 R. II. when all the *Acts* of this *Parlament* were nulled: and the *Lords* and *Commons* might be very willing to let the *Bishops* with-

withdraw, that their business might proceed with less difficulty against all the *King's Ministers*. So that here was a concurrence of many circumstances, which made the *Bishops* think fit not to appear in the *House*, *this Parliament*; and the *King*, *Lords* and *Commons* to be willing to receive their *Protestation*. But in the *Anti-Parlament* to this, that I mean 21 R. II. the *Commons* pray the *King*, that since divers *Judgments* were undone heretofore, for that the *Clergy* were not present, they might appoint some *Common Proctor* with sufficient Authority to that purpose. This is a *Passage* which deserves consideration, and tends very much to clear the whole matter.

For the *House of Commons* declare, that divers *Judgments* had been undone for want of the *Presence of the Clergy*. Therefore their Concurrence, in the judgment of the *House of Commons*, was thought necessary to make a *Judgment* valid. A very late *Author* finds himself so perplexed with this, that he knows not how to get off from it. He cannot deny this to be in the *Rolls of Parliament*, and to be the *first Petition* of the *Commons*: but then he blames them for rashness and error, and want of due *Examination* of
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Precedents. As though it were possible for any man now, to understand the Law and Practice better then the whole *House of Commons* then did. He saith, they were mistaken palpably *de facto*, in saying that divers *Judgments* have been heretofore undone; and yet presently confesseth, that the two *Judgments* against the two *Spencers* were reversed for this Cause; but he saith, there are no more to be found. Where doth he mean? in his Study? or not now extant in the *Parliament-Rolls*? But have we all the *Rolls* of *Parliament* that were then in being? or must men so boldly charge the *House of Commons* with *Ignorance*, *Error*, breaking the *Laws*, because they speak against their fancies? But this *Gentleman* very peremptorily concludes the *House of Commons* then guilty of a very strange and unaccountable *Oversight*. It is great pity, a certain *Gentleman* had not been there to have searched *Records* for them, and to have informed them better. But we think a *Judgment* of the whole *House of Commons* in such a *Case*, declared in so solemn a manner, without the least contradiction from the *King* or the *Lords*, might deserve a little more respect; and it had certainly had it, if it had made for
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the other side. But we see the *House of Commons* it self is revered, or not, as the Judgment of it serves mens purposes. And yet this was more then the bare Judgment of the *House of Commons*: for a *Petition* was made upon it, and that *Petition* granted; and consequently a *Common Proctor* appointed, and that *Proctor* allowed by *King, Lords and Commons*. So that this was a Judgment ratified by consent of the *King* and the *whole Parliament*. For, if a *Petition* were made on a false ground, what had been more proper, then for the *Lords* to have open'd this to the *Commons*, and to have told them how unadvised and false their Judgment was? whereas the *Lords* consented, and the *Proctor* was admitted, and gave his *Vote* in the name of the *Clergy*. But there is something more to confirm this Judgment of the *Commons*, and that is, the *Parlament II R. II.* making *Petition* to the *King*, that all Judgments then given might be approved, affirmed and stablished, as a thing duely made for the Weal and Profit of the *King* our Sovereign Lord, notwithstanding that the *Lords Spiritual* and their *Procurators* were absent at the time of the said Judgments given. What means this *Petition*, if there had been

been no doubt at that time, that these Judgments might be reversed, as not duely made, by reason of the absence of the *Prelats*? The onely answer in my mind is, that it was *Error Temporis*, they were of that mind then, but some are resolved to be of another now.

But from hence we plainly see, that even in *R. II*'s time the Concurrence of the *Bishops* was thought so necessary, that one *Parlament* declared *Judgments had been reversed for want of it*; and that very *Parlament* wherein they absented themselves, got a *Clause* inserted on purpose to prevent the nulling of those *Judgments*: which signified nothing to the *Parlament 21 R. II.* which reversed them all.

There is something more considerable to our purpose in this *Parlament*; viz. that the same *Authour* produceth the Testimony of a *MS. Chronicle*, which largely handles the Affairs of that *Parlament*, wherein it is confessed, that the *Bishops*, by concurring with the *Lords* in the Revocation of the *Earl of Arundel's Pardon*, did give *Vote* in a *Case Capital*: for so the words are there cited, *Dederunt ergo locum Prelati iudicio Sanguinis in hoc facto.* Which shews that the *Bishops* did then

Discourse of
the Peerage,
Ec. p. 20.

then give their *Votes* about the *validity* of the *Pardon*: which the *Authour* of that *Chronicle* indeed condemns them for, and tells us some thought they incurred *Irregularity* by it. From whence it follows, that all the *Penalty* supposed to be incurred was onely *Canonical*; but he never charges them with going against the *Law* or *Custom* of *Parlament* therein.

Let. p. 30.

p. 79.

But the *Authour* of the *Letter* saith, *Whatever was done this Parliament signifies nothing, because the whole Parliament stands repealed by 1 H. IV. and all done in it declared null and void.* Yet, to our comfort, the same *Authour* tells us, *the three Henry's were Usurpers*; and therefore I desire to be satisfied, whether an *Usurper*, by a *Parlament* of his calling, can null and repeal what was done by a *King* and his *Parlament*. If he may, then the *King* lost his *Title* to the *Crown* by the late *Usurpers*; if not, then the *Parlament* 21 R. II. could not be repealed by that 1 H. IV. If the *Authour* of the *Letter* had considered this, he is a *Person* of too great *Judgment* and *Loyalty*, to have mention'd, more then once, the *Repeal* of that *Parlament*, by the subsequent *Parlament* 1 H. IV.

Let. p. 80.
pag. 115.

From all this we see, that by the *Judgment*

ment of the *whole Parliament*, both 11 R. II. and 21 R. II. the *Bishops* had a Right to sit, so far that *Judgments* were reversed where they were not present ; and therefore all the pretence they could have for withdrawing must be from the *Canon-Law* : which although not sufficient to bind them, if the matter had been contested, yet it served them for a very colourable pretence of absenting themselves in such dangerous times, as those of 11 R. II.

Here the *Authour of the Peerage and Jurisdiction of the Lords Spiritual* thinks he brings seasonable relief to the *Cause*, when he undertakes to prove, that the *Bishops* withdrawing was not meerly on the account of the *Canon-Law*. This, I confess, is home to the business, if he can make it out. (1.) He saith, *there was an Act of Parliament before, that did expressly prohibit them to exercise Jurisdiction in those Cases.* This we utterly deny. And the *Constitution of Clarendon*, to which he refers, proves the contrary. (2.) *The Bishops made bold with the Canons* when they thought fit, as 21 R. II. But how could they doe that, unless they had a *Parliamentary Right* to be present? He saith, *the Constituting a Proxy was as great*

great a violation of the Canons, as being personally present : and what then? therefore the Parliament would not have suffered them to doe that, if there had been a Law to exclude them. How doth this prove that the Bishops did not withdraw on the account of the Canons 11 R. II. because they made a Proxie 21 R. II? But why did they not appear personally, if they had no regard to the Canons; when the receiving their Proxie shewed they had a legal Right to appear? But he grievously mistakes the meaning of the Canon of Stephen Langton in Lyndwood, when he interprets *Literas pro pœna sanguinis infligenda. scribere vel dictare*, against making of Proxies; which is onely meant of giving or writing the Sentence for Execution. (3.) He saith, they were excluded by ancient Custom; which, by a very subtle way of reasoning, he proves to have been part of the Fundamental Contract of the Nation, as he speaks. Seeing then, saith he, it is without doubt that there was such a Custom, that the Prelats should not exercise Jurisdiction in Capital Cases; (not so altogether without doubt, unless it were better proved then we have yet seen it;) and there is no Record that doth mention when it did begin,

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nor any time when it could be said there never was such an Usage; (yes, before the Council of Toledo being published in Spain, and receiv'd here;) it must of necessity be supposed, that it is as ancient as the Government it self, and part of the Fundamental Contract of the Nation. Which looks so like a Jesuitical Argument, that one would have thought he had been proving Transubstantiation by it. For just thus the Argument runs at this day among that Party; There was a time when it was receiv'd, and no time can be instanced in wherein it was not, therefore it was a part of the Fundamental Religion of *Jesus Christ*. The plain Answer in both cases is the same: If we can produce unquestionable Authority to which a Doctrine or Practice is repugnant, we are not obliged to assign any punctual time in which it must first come in. But in this case, we do assign the very time and occasion of the *Bishops* absenting themselves in *Capital Judgments*, and that was from the receiving the *Canon* of the Council of Toledo here: For no such practice can ever be proved before. And therefore this can never be proved to be any part of the *ancient Common Law* of England. And that this came in by way

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of imitation of other *Countries*, appears by the citing the *Council of Toledo* both by *Lanfranc* and *Richard* in the *Council of Winchester*. (4.) He saith, the Practice is *ancient*er then any of the *Canons of the Church*. But how doth that appear? The eldest *Canon* he can find is that of *Stephen Langton* in *Lyndwood*, which was made above 50 years after the *Parlament* at *Clarendon*. But we have made it evident, there was a *Canon* receiv'd here in *Lanfranc's* time, long before the *Constitution* of *Clarendon*. And so a full Answer is given to these *Objections*.

But we are told, by the *Authour* of the *Letter*, that the *Bishops Protestation* being receiv'd and enter'd in the *Roll*, or *Journal-Book*, makes it to pass for a *Law*, it being agreed to by the *King* and two *Houses*; so as whatever was the *Law* before, if it were onely the *Canon-Law*, it is now come to be the *Law and Rule of Parliament*, and the *Law of the Land*.

2. This is therefore the second *Point* to be examined, Whether the receiving this *Protestation* amounts to a *Law of Exclusion*? which it can by no means do for these two *Reasons*: 1. from the nature of *Protestations* in general, 2. from the particular nature of this *Protestation*.

1. From

1. From the nature of *Protestations* in general. For a *Protestation* is onely a Declaration of their minds that make it, and not of theirs who receive it, or suffer it to be enter'd in the *Acts* or *Records* of the *Court*; unless it be receiv'd in such a manner, as implies their consent. For, the very next *Parlament* after this, 13 R. II. the two *Archbishops*, in the name of the whole *Clergy*, enter a *Protestation*, That they gave no assent to any *Law* or *Statute* made in restraint of the *Pope's Authority*; and it is said in the *Rolls* of *Parlament*, that at their requests these *Protestations* were enrolled. Will any man hence inferre, that these *Protestations* were made *Acts* of *Parlament*? If the *Cause* would have born any better, a Person of so much skill in proceedings of *Parlament* would never have used such an *Argument* as this. Besides, it is a Rule in *Protestations*, *Si Protestatio in Judicio fiat, semper per contrarium actum tollitur*, saith *Hostiensis*; Sum. l. 1. de Constit. n 18. pag. 24. A *Protestation*, although allowed in *Court*, is taken off by a subsequent *Act* contrary to it. Which shews, that a *Protestation* can never have the force of a *Law*; because it may be destroy'd by the *Act* of the *Parties* themselves. If therefore the *Bishops* did afterwards act contrary to this *Protestation*,

tion, they took away all the force of it.

2. The particular nature of this *Protestation* is such, as doth most evidently preserve their *Right* to be personally present on the account of their *Peerage* and *Baronies*; and the great design of a *Protestation* is, to preserve a *Right notwithstanding some Act which seems to destroy it*; as their *absenting themselves* on the account of the *Canons* might seem to doe. But of this already.

3. We are now to consider the third *Point*, Whether, on supposition that on the account of the *Canon-Law*, the *Bishops* had always withdrawn in the time of *Po-pery*, that had continued in force still since the *Reformation*? I think not, upon these Reasons.

1. Because the *Canon-Law* was founded upon a Superstitious fancy, viz. that if *Clergy-men* be present in *Causes of Bloud*, they contract Irregularity *ex defectu perfectæ Lenitatis*, as the excellent *Canonist*, *Navarr*, saith, because it argues a want of perfect Lenity. But if we consider the cases they allow, which do not incur Irregularity, and those they do not allow, which do incur it, we shall find all this stir in the *Canon-Law* about this matter to be onely a Superstitious kind of Hypocrisy.

1. If

1. If a man in *Orders* gives another man Weapons, without which he could not defend himself, and by those weapons he maims him that assaulted him; this doth not make him *irregular*: but if he kills him, it doth: and yet the *Canons* make the case of Dismembring and Death the same.

2. It makes a man act against the *Law of Nature* to prevent *Irregularity*. For they say, if it be for the defence of Father or Mother, or preventing the ruin of his Country, although the Cause be never so just, a *Clergy-man* that dismembers, or takes away another's life, is *irregular*.

3. If a *Clergy-man* discovers Treason, or accuses another for Treason, without a Protestation, that he doth not doe it with a design to have him punished; he is *irregular*: but if he makes that Protestation, although death follows, he is not.

4. If a *Clergy-man* be in an Army, and perswades the Souldiers to fight manfully, and kill as many as they can; this doth not make him *irregular*; nay, although he beats them, if they will not fight: but if he happens to kill an enemy himself, then he is.

5. If he gives a Souldier a Sword or a
E 3 Gun,

Gun, by which he dispatches his enemies, if he did it with a particular intention that he should slay or maim them, he is *irregular* ; if onely with a general intention, that he should overcome, he is not. This being somewhat a nice Case, the *Canonists* take more then usual pains to prove it. And from hence they defend their *Priests* and *Jesuits* in the *Indies*, who carry the *Cross* before their Armies into the Field, and encourage them to kill all they can : and yet *Navarr* saith, they are so far from being *irregular*, that they are *regularissimi*, as his word is.

6. If a man, to gain an Indulgence, carries a faggot to burn an Heretick, if it be with a design to take away his life, he is *irregular* : but if he be hanged first, or dead before it be thrown into the fire, then he is not.

7. If a man in *Orders* helps a Chirurgeon in cutting off a man's Leg, he is not *irregular* : but if a man be justly condemned to have his Leg cut off, if he then gives any assistance, he is *irregular* : because the one is moved out of Mercy, and the other out of Justice.

8. If the *Bishops* sit and condemn a man for Heresy, and deliver him over to the

the *Secular Power* for Execution ; yet they free this from *Irregularity*, or else the practice of the *Inquisition* were lost. This seems a very difficult Case : but the *Canonists* save this, by saying that the *Inquisitours* , when they deliver them over to the *Secular Power*, do pray *that they may not be hurt either Wind or Lim* ; as it appears by the *Forms* used in the *Directorium Inquisitorum*. And if this be not the height of Hypocrisie, let the World judge. And therefore this part of the *Canon-Law* is not consistent with the Sincerity of the *Reformation*.

Covarruv. ad
Clem. si fa-
rios. p. 2.
§ 5. n. 6.

2. This part of *Canon-Law* is inconsistent with the *King's Power* over *Ecclesiastical Persons*. For it supposeth them liable to the penalty of a *Law*, which he hath no cognisance of , and derives no force or authority from him : which tends to the diminution of the *King's Prerogative Royal* , and therefore it is nulled by the *Stat. 25 H. VIII. c. 19*. I do very much question whether this ever were any part of the *Canon-Law* of *England* , notwithstanding the *Pope's Decretals* ; i. e. whether these *Canons* ever received confirmation by the *Royal Authority* , either in *Synodal Constitutions* , or elsewhere. And it would be a very hard

case, if *our Kings* had not the same Privileges which are allow'd in *Popish Countries*; viz. that nothing passies for *Canon-Law* within their *Territories*, till it pass the examination of the *King's Council*, and approbation by his *Authority*. Thence in *France* nothing passies without the *King's Pareatis*; nor in *Spain* or *Flanders*, without the *King of Spain's Placet*; no nor in the *Kingdom of Naples*, without the *Royal Exequatur*. It is well known, that the 6. *Book of Decretals* was not allowed in *France*, because of the quarrel between the *King* and *Boniface VIII.* and that even the *Council of Trent* it self was not allowed by *Philip II.* till it had been strictly examined by the *King's Council*, that nothing might be allowed which tended to the diminution of his *Prerogative*. How then will men justifie the making that a part of the *Canon-Law of England*, which was repugnant to the *Rights* of the *Crown*, and deprives the *King* of the *Power* of taking advice of those of his *Subjects*, whom he hath summon'd for that end?

3. The *Sanction* of this *Law* is ceased, which was *Irregularity*: And some of our most Learned *Judges* have declared, that is taken away by the *Reformation*. But
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in case any be of another opinion, I shall urge them with this inconveniency ; viz. that the great *Instrument* of discovering the *Plot* falls under *Irregularity* by it. For it is most certain, by the *Canon-Law*, that a man in *Orders* accusing others of *Treason*, without making his due *Protestation* in *Court*, is *Irregular*. But if this be now thought unreasonable, as it is, in the person of an *Accuser*, why should it not be so in the case of *Judges* ? And if the *Irregularity* be taken away, then the *Sanction* is gone : and if the *Sanction* be taken off in a meer *positive Law*, the force of the *Law* is gone too. And therefore this *Canon-Law*, which forbids *Clergymen being present in Capital Cases, and giving Votes therein*, is wholly taken away by the *Reformation*. And we do not find any mention of it for 80 years and more after the *Reformation* ; till about the time of the *Earl of Strafford's Trial*, a *Book* being printed about the *Privilege of Peers*, wherein this *Protestation* was mention'd, hold was presently taken of it, by Men who thought they could not compass their ends without removing the *Bishops* out of the *House* : and when the *Bishops* insisted on their *Right*, and could not be heard, but at last were willing to *salve* their
their

their *Right* by *Proxies*; the *Lords* of the *Cabal* prevailed with their friends, to declare they would use no *Proxies* themselves, and so by that artifice shut the *Bishops* out of Doors.

4. The practice hath been so contrary, since the Reformation, that I find no manner of regard hath been shewed to it. For the *Archbishop* of *Canterbury* was the first nominated in the *Commission* for the Trial of the *Queen* of *Scots*; as appears by the *Commission* it self in *Camden*; which is directly contrary to the *Canon-Law*. Some distinguish the *Bishops* acting by *Commission*, from their being *Judges* in *Parlament*. For which there is no manner of Reason with respect to the *Canon-Law*, which is rather more express against any kind of *Commissions* in Cases of Bloud; as appears by the *Council* of *Toledo*, the *Synodal Constitution*, and the *Pope's Decretals*. And there hath never been any scruple about *Divines* sitting on the *Crown-side* as *Justices* of the *Peace*, when *Sentence* of death is pronounced; nor in the *Ordinary's* declaring *Legit*, or *Non legit*, when a man's life depends upon it. But, which is yet more to our present purpose, in the *Parlament* 22. May 1626. upon the Impeachment of the *Earl* of *Bristol*

Camden.
Annal. A. D.
1586.

Vid. Lynd-
wood in Cen-
sit. Othob.
c. Nè Clerici.
v. In eisdem.

stol of high Treason, 10 Bishops, 10 Earls, 10 Barons, were appointed to examine the Evidence ; and upon their Report he was sent to the Tower by the whole House. All which shews, that there hath been no regard had to the force of the Canon-Law in this matter since the Reformation : That being a Spirit lay'd long since by the Principles of our Church ; and it would be strange, if some mens zeal against Popery should raise it again.

C H A P. III.

The Precedents on both sides laid down : those against the Bishops examined and answered.

II. **I** Now come to examine the *Precedents*, and shall proceed therein according to due Order of Time.

And so the *first* is taken from the *Saxon times ; viz. from Brompton's Relation about Edward the Confessour's appealing to the Earls and Barons about Earl Godwin's murdering of his Brother Alfred. Here we see, saith the Authour of the Letter, it was onely ad Comites & Barones that he appealed, and they were one-*
lett. p. 57.
pag. 59.
ly

ly to judge of it, and not Bishops or Prelates.

I have 2 things to answer to this *Precedent*. 1. That we have great reason to suspect the truth of it. 2. That if it were true, we have no reason to suspect the Bishops to be excluded.

1. For the truth of the Story. That there is great reason to suspect it, appears, in that it is the single relation of *Brompton*, against the consent of the other *Historians*, (and some of them much antienter, and nearer to that time,) who mention *K. Edward's* charging *Earl Godwin* with the Death of his Brother, not in *Parlament*, but as they were at Table together at *Winchester*, upon the occasion of a saying of *Earl Godwin's*, upon the King's Cup-bearer's stumbling with one foot, and recovering with another; See, saith he, *how one Brother helps another*. Upon which *Matt. Westminster*, *Knighton*, and others say, that the King charged him about the Death of his Brother *Alfred*. Whatever the occasion was, our best *Historians* of that time, *Malmsbury* and *Ingulphus*, say, it was at an Entertainment at *Winchester*, and that *Earl Godwin* died upon the place; being choaked, as they say, with a Morfel of Bread he took with
a great

a great Execration upon himself if he were not innocent. *Knighton* saith, he was question'd for the Death of his Brother by *Hardecnute*, and that he cleared himself, by saying he did nothing but by the King's command. But suppose *Edward* to be never so weak a Prince, is it likely this should be done by an Appeal in Parliament by the King himself; and that afterwards, by the Judgment of his Earls and Barons, he and his Sons and 12 Kinsmen should make the King amends, by as much Gold and Silver as they could carry between their Arms? Besides, *Brompton* saith, this was done by *Godwin* when he returned to *England*, after King *Edward's* coming to the Throne; whereas *Malmsbury* shews, that it was through *Earl Godwin's* interest, that ever he came to it; and so the marrying his Daughter would make any one believe.

2. But suppose it true. What reason is there to conclude the Bishops not present, who were never absent through all the *Saxon* times, after *Ethelbert's* Conversion, in any publick Councils of the Nation? They had no *Canon* then to be afraid of; for that of the Council of *Toledo* was brought in by *Lanfranc*. And it was not against the practice of those
Times.

Lett. p. 110.

Times. For if we believe as true a *Story* as this of *Brompton*, the *Archbishop* of *Canterbury* himself condemned King *Edward's* Mother *Emma* to a Trial by hot Irons, which was present death without a Miracle : and this it is said was done by the consent of the *King and the Bishops*; which is as good a *Precedent* against *Temporal Lords*, as the other is against the *Bishops*. However, this is certain, that the *Bishops* then sate in the *County-Court* at all *Judgments*. And whereas the *Authour* of the *Letter* would avoid this, by saying that no *Capital Crimes* were tried there ; the contrary is most certainly true. For the *Laws* of King *Edward*, as they were set forth by *H. I. c. 31.* mention the *Capitalia Placita* that were there held. And the *Authour* of the *MS. Life* of *S. Cuthbert* saith, that when one of *Earl Godwin's* Sons was *Earl of Northumberland*, and one *Hamel*, a very bad man, was imprison'd by him, his *Friends* interceded earnestly with him, *nè capite plecteretur, that he should not lose his head.* By which it appears, that *Cases Capital* were heard and determin'd in those *Courts*, the *Bishop* and *Earl* sitting together in *Judgment*. And here the *Point* is plainly gain'd, because the *Authour* of the *Letter* grants

grants that the *Bishops* sate in all *Judgments* in the *County-Courts*, and then puts the matter upon this Issue, whether *Capital Crimes* were there tried or not ; which I have clearly proved that they were. But I shall make another advantage of this against the *Authour* of the *Peerage, &c.* for it plainly overthrows that confident Assertion of his, That *without doubt* there was a *Negative Custom*, that the *Prelates* should not exercise *Jurisdiction* in *Capital Cases*, so ancient as to be part of the *Fundamental Contract* of the *Nation*. It were a thousand pities that such well-sounding words, so handsomely put together, should signifie nothing. I dare not be so positive as he is, but am of opinion, that if he could be perswaded to produce this *Fundamental Contract* of the *Nation*, which I perceive he hath lying by him, it would not amount to so much as a *blind Manuscript*. If it be said, that *Brompton* onely mentions *Earls* and *Barons*, and *Bishops* were not then made *Barons* ; I answer, that *Baronies* were brought into *England* by the *Conquerour*, and therefore *Brompton* must speak improperly, and consequently, taking it onely for a Title of Honour, he means no more then those who were the Great men of that time, and

Lett. p. 21.

and so may take in the Bishops too : of which more afterwards. But there is one thing more in the *Laws* of *H. I.* (which were onely a restoring *K. Edward's Laws*) that implies that *Bishops* had then a Power of Judging in *Cases Capital* ; which is *c. 58. Qui occiderit Episcopum sit in arbitrio Principis & Episcoporum*, He that killed a Bishop was to be left to the Will of the King and the Bishops. Which shews that they were to hear and examine the whole Evidence, and to give Judgment according to it.

Lett. p. 55.

After the *Saxon* times, the first Precedent produced is of the 33 *Edw. I.* concerning *Nicolas Segrave*, who was summon'd to appear in *Parlament*, and after his Offences were open'd, the King advises onely with the *Temporal Lords*, who declared, such a man deserved to lose his Life. But is he sure the *Bishops* were not present ? No: he saith, that doth not appear by the *Record* ; but it appears clearly they were not to meddle with it. How so ? The King declares, that he would have the Advice *Comitum, Baronum, Magnatum, & aliorum de Consilio suo*. But is he sure they are not comprehended under *Magnates*, and that there were no *Clergy-men* at that time of the King's Counsel ? What thinks he

he of *William de Hamilton*, Dean of *York*, who was made *Lord Chancellour* Jan. 16. 33 *Edw. I.* and this *Parlament* was held the next Sunday after *S. Matthias*, which was the latter end of *February*? And in the 35. year, *Ralph de Baldock*, Bishop of *London*, was made *Lord Chancellour*: and scarce any other but *Church-men* had that *Office* all his days. The Bishop of *Bath and Wells* was *Chancellour* near twenty years of his *Reign*; after him the Bishop of *Ely*; after him the Dean of *Chichester*; and then comes the Dean of *York*. And among the *Lords Treasurers* of his time, were the *Archdeacon* of *Dorset*, the *Abbot* of *Westminster*, two Bishops of *Bath and Wells*, whereof one was *Treasurer* at this time. These two, I hope, we may suppose to be of the *King's Counsel* in this business; who we are certain were both *Church-men*. And if they adjudged *Nic. de Segrave* worthy of death, who so likely to deliver that Judgment as the *Chancellour*? But suppose these were not there, whom doth he mean by the *Magnates* then distinct from *Earls* and *Barons*, who were of the *House of Peers*? Mr. *Selden* will inform him, if he needs it, that there were no *Dukes* till the 11. of *Edw. III.* nor the Title of

Marquess till R. II. nor of *Vicount* till H. VI. And yet here were *Magnates* in Parliament, who were neither Earls nor Barons : and therefore we must in all reason understand the great *Church-men*, who were not so nice of meddling with *Criminal Causes* in Parliament of the highest nature in the time of *Edw. I.* As appears by the great *Cause* so much agitated in Parliament 20 *Edw. I.* concerning the *Earls* of *Hereford* and *Gloucester* ; where this latter is charged with raising Arms without Commission , and committing Murthers and horrible Devastations in the Lands belonging to the other ; and the King in Parliament appoints the *Bishop* of *Ely* with others to be a *Committee* for examination of this matter. And when they had both submitted to the King's Pleasure, we have these remarkable words in the *Placita Parliamentaria*. Per Consilium Archiepiscoporum, Episcoporum, Comitum, Baronum, ceterorumque de Consilio suo existentium, facere volens in premissis, & ut voluntas sua iusta sit & rationalis, prout decet, eorumque assensum in premissis petiit, & Consilium. Propter quod, habito tractatu diligenti coram ipso Domino Rege & Consilio suo super predictis, tam ipsi Domino Regi

Regi quam ceteris Prelatis & Magnatibus, & singulis de Consilio suo, videtur quoad Comit. Gloucestr. and then follows the *Sentence*; which I confess did not extend to Life, but to a Forfeiture of his Estate to the King. However, we see hereby that the *Bishops* were present at all the *præliminary Debates*, and the King asked their *Advice*; so that they had their *Votes* in the *Sentence*, whether it should extend to Life or not.

In the Reign of *Edm. II.* we meet with a remarkable *Precedent* in behalf of the *Bishops Right*, which is of a *Judgment* reversed made by the *Lords* without the *Prelats*, viz. the *Judgment* against the two *Spencers* 15 E. II. which *Judgment* is said to be passed at *Oxford* that year, but in the *Parlament* at *York*, the same year, claus. 15 Ed. 2. n. 23, 24. & dorf. 13. 32. it was nulled and made void before the King, Lords and Commons; and one of the Reasons given for it is, because the *Lords Spiritual*, who were *Peers*, assented not to it. This *Precedent* had been cited and allowed by Mr. *Pryn*, in his *Plea for the Lords*; and therefore it is Plea for the Lords, p. 193. to be wonder'd the *Authour* of the *Letter* takes no notice of it. But the later *Authour* of the *Discourse about the Bishops Peerage and Jurisdiction*, owns the truth Discourse of the Bishops Peerage, of pag. 20.

of the thing, saying, *that the two Judgments against the two Spencers were reversed 15 Edw. II. for this Cause, through the great favour and interest they then had at Court.* But then he thinks he hath taken off the force of this *Precedent*, by saying *that 1 Edw. III. c. 1. this Judgment is declared good, and therefore the said Reversal null and void; and the two Spencers upon this affirmance of the Judgment were executed.* This last Assertion every one knows to be a grievous mistake, that hath but looked into our *History*: for the *Spencers* were executed before *Edw. III.* came to the Crown; the elder in *October 19 Edw. II.* the other the latter end of *November 20 Edw. II.* And whereas he insists upon the *Affirmance of the Judgment 1 Edw. III.* he had done well to have look'd a little farther, and then he would have found that *Act* also repealed *21 R. II.* So that if the *Act* of *1 Ed. III.* which affirms the first Judgment, may seem to take off the force of this *Precedent*, the repealing of that *Act* in the *21 R. II.* restores it again, and leaves it in its full force. Especially if it be considered, that the *Act* of *1 Ed. III.* was not barely repealed, but declar'd in Parliament to be unlawfull, because *Ed. II.*

was living, and true King, and imprison'd Rot. 64.
 by his Subjects at the time of that very Par- 21 R. 2.
 lament of 1 Ed. III.

Thus far this *Precedent* is good. But I will conceal nothing that may with any colour be objected against it. And I cannot deny but what the *Authour* of the *Letter* objects, against the Bishops constituting a *Proctor* to represent them in Capital Causes, seems to be of equal force against this *Precedent*, viz. That this *Parliament* of the 21 R. II. and all that was done in it, was repeal'd in the 1 H. IV. And if that be so, (and those Acts of State which then passed had not again been repealed 1 Ed. IV.) then the Repealing of that of 1 Ed. III. signifies nothing, and consequently the *Affirmance* of the first *Judgment* against the two *Spencers* is good notwithstanding that Repeal. And therefore that we may examine this matter to the bottom, I shall set down the very words of the *Authour* of the *Letter* concerning it. Speaking of the *Declaration* made by the Lawyers in the 10 Ed. IV. concerning the Bishops making a *Procurator* in Capital Causes, he hath these words : *It is true, here is mention made* pag. 79.
of their making a Proctor, which was Error
temporis, the Error of those times, ground-
 F 3 ded

pag. 115.

ded upon what was so lately done, (as they looked upon it) though irregularly done, in the last Parliament of R. II. whom they consider'd as their lawfull King; and in truth he was so, the three Henry's that came between being but Usurpers. And again, speaking of the same business of a Proctor in the 21 R. II. he hath this remarkable passage: *I have already shewed, that this whole Parliament was repeal'd for the extravagant things that were done in it, of which this was one. And therefore nothing that was then done can signifie any thing to a leading case any ways to be followed; and this as little as any: except it could be made appear, which I am confident it cannot, that some Judgment had been reversed upon that account, because the Prelats were not present, and had not given their assent to it.*

Now if I can make out these two things, 1. That the Parliament of R. II. was not legally repeal'd; 2. That the Judgment against the two Spencers was revers'd, and that the Repeal of that Reversal in 1 Ed. III. was revok'd in 21 R. II. upon this very account, because the Prelats were not present, and had not given their assent to it; I hope the Author of the Letter will be satisfy'd, that both

both this *Precedent*, and the Case of a *Proctor*, are very significant in this Cause; and that there is a great difference between being *confident*, and *certain* of any thing.

1. That the Parliament of 21 R. II. was not legally repeal'd. And for this I take the *Authour's* own acknowledgment, that R. II. *was in truth lawfull King*, and that H. IV. was but an *Usurper*: Nay, I add farther, that R. II. was alive and in prison when H. IV. repeal'd the Parliament of 21 R. II. For so it is said in the very *Act of Repeal*, that R. II. *late King of England was pursued, taken, put in ward, and yet remaineth in ward*. And now I leave it to the *Authour* of the *Letter*, whether a Parliament call'd by a lawfull King, and the Acts of it, ought to be deem'd legally repeal'd by a Parliament that was call'd by an Usurper, and held whilst the lawfull King was alive, and detain'd in prison.

2. That the *Judgment* against the two *Spencers* was revers'd, and the Repeal of the Reversal of it in 1 Ed. III. revok'd in 21 R. II. and that upon this very account, because the *Bishops* were not present, and had not given their assent to it; which the *Authour* of the *Letter* is

pag. 113.

Kot. 55, 56.
21 R. 2.

confident cannot be made appear. That this *Judgment* was reversed for this Reason I have already shewn, viz. in the Parliament at *York* 15 *Ed.* II. And I shall now shew, that the Repeal of that Reversal in 1 *Edm.* III. was revok'd in 21 *R.* II. and that upon the account mentioned. For in this Parliament *Tho. le Despenser*, Earl of *Gloucester*, exhibited two *Bills*, in which he prayeth that the Revocation of the Exile of the two *Spencers* in 15 *Ed.* II. might be brought before the King and confirmed, and that the Repeal of the same made in the 1 *Ed.* III. might be revoked. Of which *Act* of Repeal these *Errours* are assigned, among others : because the *Prelats*, who are *Peers* of the *Realm*, did not assent to the *Judgment* ; and because it was made onely by the *Earls* and *Barons*, *Peers* of the *Realm*, &c. and because it was made against the form of the *Great Charter* of *England*, in which it is contain'd, that no man shall be exil'd, or otherwise destroyed, but by the lawfull *Judgment* of his *Peers*, or by the *Law* of the *Land*. So that it seems it was look'd upon as a breach of the *Great Charter*, for the *Temporal Lords* to condemn a *Peer* without the Assent of the *Bishops*, and that such a *Judgment* was not

not esteem'd a lawfull Judgment by his Peers. And those *Errours* of the first Judgment assign'd in the Revocation of it in 15 Ed. II. are allowed in this Parliament of 21 R. II. and that Revocation confirm'd, and the *Repeal* of it in 1 Ed. III. revok'd upon the same account. I shall onely observe, that in this Parliament (as R. 2. 21. before in 15 Ed. II.) the *Bishops* are declared to be *Peers*; *Peers of the Realm*, Rot. 55. *Peers in Parliament*, Rot. 56. & 61; but most fully and distinctly in the *Roll* last cited, *Peers of the Realm in Parliament*. Of which farther use may be made in the last Chapter concerning the *Peerage of the Bishops*.

And now to sum up the force of this Precedent for the Jurisdiction of the *Bishops* in Cases of *Treason*. Here is a *Reversal* of a Judgment, because made without the Assent of the *Prelats*, by the Parliament at York in 15 Ed. II. And whereas it is said this *Reversal* was repeal'd, and the first Judgment affirm'd in 1 Ed. III. I have shew'd, that this was no legal *Repeal*, because Ed. II. was alive, and lawfull King, (or else Ed. III. could never have been so) in the time of that first Parliament of Ed. III. and consequently Ed. III. at that time was an Usurper, and the
Pro-

Proceedings of that Parla^ment null and void. So that the *Reversal* in 15 *Ed.* II. stands good, notwithstanding the *Repeal* in 1 *Ed.* III. Besides that this *Repeal* (whatever it was) is solemnly *revok'd* in 21 *R.* II. And *H.* IV. who *revers'd* all the Proceedings of the Parla^ment of 21 *R.* II. during the life of *R.* II. is acknowledg'd by the *Authour* of the *Letter* to have been an *Usurper*, and *R.* II. to have been a *lawfull King*. And now I think that this *Precedent* hath all the advantage that can be, and that the *Jurisdiction* of the *Bishops* in *Cases of Treason* could not have been asserted in a higher manner, then to have a *Judgment* in *Case of Treason* solemnly *revers'd* in two Parla^ments for this very cause, *because the Bishops, who are Peers, assented not to it*: And this *Precedent* own'd by the *House of Commons*, in their *Petition* to have a *Common Proctor* appointed by the *Clergy*, in this very Parla^ment of 21 *R.* II. as is acknowledg'd by the *Authour* of the *Letter*.

pag. 115.

To conclude this matter ; whether the Acts of Parla^ment which contain this declaration of the *Peerage* of *Bishops*, and their *Jurisdiction* in *Cases of Treason*, were sufficiently *repeal'd* or not ; this solemn
 Asse-

Assertion of it in two several Parlements, together with the *Petition* of the *Commons* mentioned before, are a most clear evidence, that in the general Opinion of the *King*, *Lords*, and *Commons*, this *Jurisdiction* did of right belong to the Bishops. And I am sure they are a Demonstration against the *Authour* of the *Peerage* his Assertion, of a Negative *Custom*, ancient as the *Constitution* of the *Nation*, that *Prelats* should not exercise *Jurisdiction* in *Capital Cases*. For had this been a clear and undoubted Custom from the first original of this Nation, it is morally impossible it could have entred into the minds of two Parlements, solemnly to have raised this doubt, whether a Judgment given in a case of *Treason* by the *Temporal Lords* without the Assent of the Bishops were valid, and to have determin'd that it was not; when yet there was no manner of reason to imagine that the Bishops ever had any *Jurisdiction* in such Cases, nay, when there was an immemorial Custom and Usage to the contrary, namely, that the *Temporal Lords* had in all times exercised this *Jurisdiction* alone, and the Bishops had been excluded from any share in it.

And

And in the *Apology* of *Adam D'Orleton*, Bishop of *Hereford*, and after of *Winchester*, for his imprisoning *R. de Baldock*, a great Confident of *Hugh Despencer's*, he declares, that the reason why he was carried to *Newgate* was through the violence of the People; although, saith he, the *Parlament* then sitting, there was no cause of fear but Justice would be done. His words are, *Domino Rege, Prælatibus, Comitibus, ac aliis terræ Optimatibus Londoniæ tunc congregatis & præsentibus, pro Justitia ibidem in Parlamento convocatis omnibus exhibenda.* Which shews that the *Prelats* then did sit in matters of Justice in the House of Lords, and in *Cases Capital*; for this *R. de Baldock* was arraigned at *Hereford* for the same Crimes that *Hugh Despencer* was.

But the main strength of the Cause is supposed to lie in the *Precedents* produced out of the *Rolls of Parliament* from the 4 *Edm. III.* to the 38 *H. VI.* The force of these *Precedents* will be better understood, if we consider these things.

I. That many of them are meer Negative Testimonies. So 4 *Edm. III.* at the Trial of *Roger Mortimer*, it is said, the *Earls, Barons and Peers of the Realm* were present, therefore the *Bishops* were not,

5 *Edm.*

5 Edw. III. onely the Great ones returned, pag. 8.9.
therefore the Bishops did not. So in the

Case of Sir John Grey. From whence he
inferrs, that the Bishops were not to Judge
so much as of a Battery. 25 Edw. III. in pag. 10.

Sir William Thorp's Case, the Grantz de
Parlament were asked their advice, there-
fore not the Bishops. 1 R. II. in the Case pag. 13.

of Weston and Gomenitz, the Bishops not
mention'd; but other Lords, Barons and
Bannerets. Sir Ralph de Ferrer's Case pag. 16.

4 R. II. the Bishops not present, because not
comprised under les Seigneurs de Parlament.

The like in Sir John Oldcastle's Case
5 H. V. The Question, he saith, is, whe- pag. 37.

ther Bishops be comprehended under les
Seigneurs de cest present Parlament. In

the Earl of Devonshire's Case 31 H. VI. the
strength lies in this, that the Peers are pag. 51.

onely mention'd; and he supposes no man
will say, the Bishops were his Peers or
Lords of the Realm. So that here are
Eight Precedents, that are no more then
Negative Testimonies: concerning which
in general, the Authour of the Jurisdiction
of the House of Peers asserted hath a good
observation; viz. That one, or two, or
twenty Precedents in the Negative, nay,
I say more, were the number equal as many
in the Negative as in the Affirmative, yet

it

Jurisdiction
of the House
of Peers as-
serted, p. 91.

it could not disprove their Jurisdiction : it would onely shew, their Lordships were free Agents, to doe it, or not to doe it, as they saw Cause ; but their Jurisdiction remained entire still, to doe it whensoever they would. So I say here; supposing that the Spiritual Lords were not present in these Cases, it onely shews, that they were free Agents, and might withdraw at some times, and be present at others : which cannot overthrow their Right, for these Reasons.

(1.) Several of his *Negative Precedents*, if they prove any thing, prove the *Bishops* were not there, when he confesses they might have been there. As,

1. In *Cases of Misdemeanours*. At the
 Lett. pag. 11. Trial of Sir *John de Lee*, 42 Ed. III. being
 charged with several Misdemeanours, the
 Record saith, *the Prelats were present*.
 50 Edw. III. Several persons were accu-
 sed by the *Commons* for Misdemeanours,
 and the *Bishops* he confesseth were pre-
 sent; as *Rich, Lions, John Lord Latimer, William Ellis, John Peecher, Lord John Nevil*: at all these Trials the *Bishops*, saith he, *were present; and no body says but they might*. So in the Case of *Alice Perrers*, 50 Edw. III. the Record saith, *the Prelats were present, and gave Judg.*
- p. 12.
- pag. 14.

Judgment as to Banishment, and Forfeiture of her Estate. 10 R. II. *Mich. de la* pag. 18.

Pool, Lord Chancellour, was accused by the *Commons* for several Misdemeanours before the *King, Prelats, and the Lords*. Here he yields the *Prelats* were Judges of Misdemeanours together with other Lords. And yet if several of his *Negative Precedents* do prove any thing, they prove too much, viz. that the *Bishops* ought not to be present at the Trial of Misdemeanours: For, he saith, the *Bishops* were not present at the Trial of *Weston and Gomenitz*, 1 R. II. nor at the Trial of the *Bishop of Norwich* 7 R. II. nor at such Judgments as that of *Sir William de Thorp* 25 Edw. III. who was condemned for *Bribery*: and yet he yields they were at the Trial of *Mich. de la Pool* 10 R. II. But if they ought not to be present at those of 25 Ed. III. and 1 R. II. and 7 R. II. neither ought they to have been present at the Trial of *Mich. de la Pool*. Either therefore his argument doth not prove they were not present at the former, being onely from general words; or they ought not to have been present at the latter, which he confesses they were. This will best appear by comparing the Cases together. 1 R. II. the *Commons* deli-

lett. p. 10.

deliver in a *Schedule* to the *Lords* of their Demands, before they would proceed to a *Subsidy*; among which one was, *That all such who without cause had lost or given up any Castle, or Town, or Fortress, to the dishonour of the King, or damage of the People, may be put to their Answer before the Lords and Commons that Parliament.* Here was no particular Impeachment of these Persons; but upon this the *Lords* sent for these two Persons who were Prisoners in the Tower upon this account; and the Charge against them was, delivering two Towns in *Flanders* without Commission. *Weston* made a long and plausible Defence, to which no Answer was given; yet both were condemned to die. The *Bishop* of *Norwich* was charged with several *Miscarriages* and *Misdemeanours*, saith he: why might not the *Bishops* be present at this *Trial*? To that he saith, he was charged with one *Capital Crime*, viz. betraying *Graveling* to the *French*: but he confesseth, he cleared himself of this, before they came to *Judgment*: and yet he would have the *Bishops* excluded at this *Judgment*; and that of *Sir William Elmham*, *Sir Thomas Trivet*, and others; but confesses they were present at the *Trial* and *Judgment* of *Mich.*
de

de la Pool. Let us then see, what kind of Trial this was. He was impeached in the name of the *Commons of England*, and 6 *Articles* were exhibited against him. The main were, *concerning defrauding the King, and misemploying the Aids granted to the King last Parliament, whereby much mischief happen'd to the Kingdom* : as may appear by the *Rolls*, and the *Articles* printed in *Knighton*. Upon these *Arti-* Knighton de
Event.
p. 2684.
cles, the Record saith that the *Commons* prayed that Judgment of Death might pass upon him, as it did upon Sir William de Thorp for receiving 20 li. by way of *Bribery*. And yet this Judgment of Sir William de Thorp is one of the *Precedents* against the Bishops being present ; when he allows that they were present at the whole Trial of this *Mich. de la Pool*, when a great *Minister of State* was so hotly charged by the *Commons*, for offences of so great a nature, and which in their Judgment deserved no less than Death. From whence it follows, by his own confession, that the *Bishops* may be present, when the *Ministers of State* are impeached by the *Commons* of such Crimes which in their Judgment deserve no less than Death.

2. In *Acts of Attainder*, when the Houses proceed in a *Legislative way*, he grants *the Bishops may be present*; and yet if some of his *Precedents* signifie any thing, they prove they ought not to be present at the passing of them. As,

Lett. pag. 6.

1. In the Case of *Roger Mortimer* and others accused and tried in Parliament 4 Ed. III. He confesseth the *Roll* cannot be read, and therefore refers to 28 Ed. III. where *Roger of Wigmore* desires that the *Attainder may be examin'd*: which was reversed by *Act of Parliament*, and therefore we may justly suppose the *Judgment* given against him was ratified in *Parliament*. And some of our *Historians* say, he was condemned *judicio Parliamenti*. And in the *Petition* of *Roger Wigmore*, he prays that the said *Statute and Judgment may be reversed and annulled*. If therefore the *Prelats* could not be present here, then they are not to be present in the *Legislative way*: If they were present in *Acts of Attainder*, then this general *Negative way* of arguing proves nothing; for then the *Bishops* were comprehended under the name of *Peers*: which, without any Reason, he saith, *the Bishops cannot pretend to be*; when it is notorious that they challenged it in *Parliament*

Cestrenf.
l. 7. c. 44.
Knighton,
p. 2558.

11 R. II.

11 R. II. and it was then allowed, as well as their *Protestation*.

2. In the case of the Murther of *John Imperial*, 3 R. II. an *Act of Parliament* pag. 15. passed to make it *Treason*: and he proves the *Bishops* had no *Vote* in it, nor were present at the preparing it. And yet he confesses, that the *Bishops* have a right to sit in all *Acts of Attainder*, because they sit then in their *Legislative capacity*. pag. 3. 118. Therefore these *Negative Precedents* prove nothing.

(2.) The insufficiency of these *Negative Precedents* appears by this, that we can make it appear by good *Testimonies*, that the *Bishops* have been often comprehended under the general *Titles of Grantz, Peers, and Lords of Parliament*, without any expresse mention made of them.

And because the great force of many of his *Testimonies* lies wholly in this, that the *Bishops* are not comprehended under the names of *Grantz, Seigneurs, and Peers*, I shall endeavour to make it clear beyond exception, that if the *Precedents* must be determined by the general words, all the advantage lies on the *Bishops* side.

It is certain that in elder times the

Baronagium Anglie did take in all the *Lords of Parliament*, both *Spiritual* and *Temporal*. But I betake my self to the expressions used in the *Records* ; and because the matter of the debate is confined within the times of *Ed. II.* and *IV.* I shall take notice of the language of *Parliament* within that time ; reserving that of their *Peerage* to the proper place for it.

I begin, as the *Authour* of the *Letter* doth, with 4 *Edw. III.* and in that year *n. 6.* the Record runs thus ; *Et est assentiu & accorde per nostre Seigneur le Roi, & tout le Grantz en pleyn Parlement* : where a Law was passed concerning Trial by *Peers* ; and in the passing of a Law our *Authour* allows the *Bishops* to be present. But it is more plain *n. 12.* *Accorde per nostre Seigneur le Roi, & les Grantz de mesme le Parlement* ; *It is agreed by the King, and the Great ones in Parliament.* But that the *Bishops* are comprehended under these *Grantz* is evident ; for it is there said, *that the Petitions of Edmund Earl of Kent and Margaret Countess of Kent*, to which that Agreement refers, were read before the *King*, the *Prelats*, the *Countes*, the *Barons*, and other *Grantz of the Parliament*. In the same year, *n. 14.* we meet with *les Prieres des Prelatz & autres*

autres Grantz, *the Petition of the Bishops and other Great men* : and then it follows, *Nostre Seigneur le Roi en pleyn Parlement, per assent, accord, prieres & conseil des ditz Prelatz & autres Grantz*; *Our Lord the King in full Parliament, by the assent, accord, petition and advice of the said Prelats and other Grantz*. Which shews that they are some of the Grantz of Parliament.

5 Ed. III. n. 3. *Touz les Prelatz & autres Grantz* : n. 13. Grantz in general is used in the Debate between the *Abbot of Crowland* and *Sir Thomas Wake* : and n. 15. *le Roi & as autres Grantz en pleyn Parlement* : n. 16. *Item fu accorde per le Roi & touz le Grantz en mesme le Parlement, auxibien per Prelatz come per autres*; *It was agreed by the King and the Great men of the Parliament, as well by the Prelats as others*. Nothing can be plainer then that here the Bishops are called Grantz, as well as the other Lords of Parliament.

6 Ed. III. n. 1. *Devant nostre Seigneur le Roi, & touz le Prelatz, & autres Grantz*; *The Articles were read before the King, the Prelats, and other Great men*. If the Bishops had not been comprehended under Grantz, the Record would

have onely used *Grantz*, and not *autres Grantz*. But the same expression is again used *n. 5*. In the second part of the *Rolls* of that year, *n. 1*. we find three several ways of expressing the Persons then present : the first, *les Prelatz, Countes, Baronns, & autres Grantz du Parlement* ; the next is, *queur Prelatz, & autres Grantz* ; the third is, *touz le Grantz en mesme le Parlement* : and all these are used to expresse the same Persons. And again *n. 3*. *touz les Grantz du dit Parlement* ; which are there opposed to *Chivalers des Countes* ; and are more distinctly mention'd before in these words, *les ditz Prelatz, Countes, Baronns, & autres Grantz, & les Chivalers des Countes, & tote la Commune*. Sometimes the *Grantz* are taken in general, for all of the House of Peers ; and the *Commons* for the Lower House. So 21 *Ed. III. n. 63*. *il assentuz per lui, les Grantz, & la dit Comunalte a son Parlement* : and again, *ditz Grantz & de tote la Coine susditz* : and, *le Roi per assent des Grantz commanda a la ditz Coine*. From these examples, and many more which might, if it were needfull, be produced, it evidently appears that the Bishops were *Grantz* in Parliament, accor-

according to the language of that Time: and therefore the *Precedents* produced wherein onely the *Grantz* are mention'd, are of no force at all against the Presence of the Bishops. And that Assertion of the *Authour* of the *Peerage*, &c. appears to be without any ground, viz. that the *Bishops* are never spoken of in any Record but by the name of *Bishops* or *Prelats*, or some such name, to distinguish them from the *Laiety*. These general Negatives are very bold and dangerous things; and one Affirmative overthrows them. But I have produced many Instances to the contrary, and might do many more. Such men who dare venture upon such bold Sayings, must be presumed to have read over all the Records themselves; and must presume that none else ever so much as looked into them. But that *Authour* discovers too much his *Second-hand Learning* in these matters; and we might have wanted several of his *Precedents*, had it not been for Mr. *Selden's Baroniage*. pag. 15;

As to the Title of *Seigneurs du Parlement*, being common to the *Bishops*, I am prevented by another hand. Rights of the
Bishops,
p. 56, 57, &c.

I shall onely adde two *Precedents* more, not taken notice of by others. The one 7 R. II. The Answer of *Mich. de la*

Pole is said to be *coram Magnatibus & Communitate in Parlamento*; where the *Authour* of the *Letter* confesseth the *Bishops* were present, and therefore comprehended under the *Magnates*. The other 15 *H. VI.* One *Philipps* complained against the *Bishop* of *London* to the *House of Commons*: they sent the *Complaint* up to the *Lords*: the *Bishop* asks the *Advice* of the *House*; who gave this *Answer*, *Non consentaneum fuit aliquem Procerum alicui in eo loco responsurum.* Which had signified nothing, if the *Bishops* had not been allowed to be *Proceres Regni*. So much for his *Negative Precedents*.

II. Some of his *Precedents* were condemned in *Parlament* to be irregular and erroneous in other respects; and therefore it is no wonder if they should be so in this.

I. The *Judgment* upon *Roger Mortimer*, *Earl of March*, 4 *Ed. III.* was reversed in *Parlament* 28 *Ed. III.* as defective and erroneous in all points; being without any *Proof* or *Witnesses*, or bringing the *Person* to answer for himself. And therefore it was an Honour for the *Bishops* not to be present.

2. The *Judgment* upon *Haxey*, 20 *R. II.* is confessed by the *Authour* to be
 Lett. p. 24. most

most unjust, and would not onely have shaken, but wholly destroyed the very foundation of Parlament; and reversed 1 H. IV. as against Right and Course of Parlements. And he confesseth the Bishops were present at condemning it, but not at passing it. Which also makes much for their Honour.

III. Some of his *Precedents* prove that when the *Bishops* did withdraw, they did it *voluntarily*, and took care to preserve their *Right*, either by *Protestation*, or appointing a *Proxy*.

[1.] That they withdrew *voluntarily*. So 5 Ed. III. it is said, that the *Bishops* did withdraw at that time, being of opinion that it did not properly belong to them to give Counsel about keeping the Peace, and punishing of Malefactours: and so, saith he, they went away by themselves, and returned no more. But although this proves nothing but a *voluntary Act* of the *Bishops* in withdrawing; yet the representation made of this matter is so partial, and different from the *Record*, that I cannot but take a little more notice of it. lett. p. 8.

I. He saith, that the *Prelats* being of opinion that it belonged not properly to them to give Counsel about keeping the Peace, or punishing such evils, they went away by them-

*themselves, and returned no more. There-
 by insinuating, that they looked on this
 matter as wholly unfit for them to med-
 dle in, and thereupon left the House.
 Whereas the words of the Record are,
 Si alerent mesmes les Prelatz & les
 Procurators de la Clergie per eur
 mesmes a conseiller de choses susdites, &
 les ditz Countes, Barons & autres
 Grantz per eur mesmes: So the Prelats
 and Proctors of the Clergy went by
 themselves to consult about the aforesaid
 matters, and the Earls, Barons and
 other Great men by themselves. So that
 this withdrawing was but into several
 Committees, as was usual at that time, by
 which the sense of the 3 Estates was best
 understood; and then they met together,
 and agreed upon what was fit to be made
 a Law. This appears by 6 Edw. III.
 A queu jour de Joedi eu ont trete & de-
 liberation, cest assavoir les ditz Prelatz
 per eur mesmes, & les ditz Countes,
 Barons, & autres Grantz, per eur
 mesmes; & auxint les Chivalers des
 Countes per eur mesmes: Upon which
 Thursday they enter'd upon debate, (con-
 cerning the News from Scotland) the
 Prelats by themselves, the Lords and other
 Great men by themselves; and so the
 Knights*

Knights of Counties by themselves. The Houses being then not wholly separate, nor always together ; but dividing into *Committees*, and not into *Houses*, as occasion required ; and then joyning together to express their common Sense. So 40 *Ed. III.* when the occasion of their meeting was deliver'd, which was an extraordinary message from *Rome*, the Pope sending for *Tribute* and *Homage*, it is said, *the Bishops went by themselves, and the other Lords by themselves, and the Commons by themselves* ; and then met together, and declared their unanimous resolution to oppose to the uttermost any such Demand. Such a withdrawing of the *Bishops* it was in this case. For they and the *Proctors of the Clergy* (whether by them we understand the *Procuratores Cleri*, who, according to the *Modus tenendi Parliamentum*, made a part of the Parliament ; or the *Proxies* of the absent *Bishops*, who were allowed to supply their places, as appears by 35 *Ed. I.* and the Case of the *Bishops of Durham* and *Carlisle* in the Parliament at *Westminster Ed. II.* and 17 *R. II.* and many other instances afterwards) thought fit to consider in this matter what was *most proper* for them. And accordingly we find

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Ecclesiastical Censures added to the *Civil Sanctions*, and brought in by the *Prelats* at that time, which are still extant in the *Record*.

2. Whereas he saith, *the Bishops returned no more*, the *Record* saith the contrary. For it expressly saith, *that the Orders for keeping of the Peace agreed on by the Committee of Lords were read before the King, the Bishops, the Knights of Counties, and the Commons, and did please them all; & per nostre Seigneur le Roi, Prelatz, Countes, Barons, & autres Grantz, & auint per les Chevalers de Countes & gentz de Commun, furent pleyment assentuz & accordez*. And the same is immediately said of the *Censures* brought in by the *Bishops*. Which made me extremely wonder at his saying *that the Bishops returned no more*; whereas it is very plain, they did not onely return, but the *Orders* were read before them, and they did give their assent to the passing of them.

In the *Parlament 11 R. II.* that it was onely a *voluntary withdrawing*, I prove from the concessions of the *Authour* of the *Letter*; viz. *that they might be present in all Acts of Attainder*. For it is evident from the *printed Statutes*, that they
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proceeded by way of *Attainder* against the *Ministers of State*; and therefore they might have been present, if they pleased, upon the *Authour's* own grounds. How is it then possible for him to understand *de Jure non possumus*, in their *Protestation* 11 R. II. of the *Law of the Land*, when he grants that in all *Acts of Attainder*, they may *de jure* be present and give their *Votes*?

[2.] When they did solemnly withdraw, they took care to preserve their *Right* two ways; (1.) by *Protestation*, (2.) by *Proxie*.

1. By *Protestation*, saving their *Right*; which was receiv'd by the *House*, and enter'd: of which before. The late *Authour* of the *Peerage and Jurisdiction of the Lords Spiritual* will not allow the *Protestation* to be an argument of any *Right*; neither, saith he, doth the permission or allowance of any *Protestation* yield the *Right* which the *Protester* is desirous to save, but onely saves the *Right* which he had before, if he had any. Whereas the *Authour* of the *Letter* makes it as good as a *Law*, being entred in the *Journal-Book*, that such a thing was agreed by the *King and the two Houses*. I will not deny that the former *Authour* speaks more

pag. 24.
Lett. p. 23.

more reasonably in this matter, when he saith, *that the utmost a Protestation can doe is, to anticipate a Conclusion, or Estoppel; i. e. to provide that the doing of any such Act as is contained in the Protestation, shall not be construed to the prejudice of the Party, so as to bar or conclude him from claiming afterwards that which in truth is his Right.* It is true, this Protestation passed with greater solemnity then usually; for it was *with the consent of the King and both Houses*: but however it retained the nature of a Protestation. And there was no distinction at that time between a *Journal-Book* and the *Rolls of Parliament*. For a good Authour assures us, *the Journals of the Upper House began 1 H. VIII.* and therefore the *Authour* of the *Pet- rage, &c.* deserved no such severe reproof on that account. But this is all I plead for, *viz.* that this Protestation was a *Salvo* to their Right; which meeting with no contest or opposition in the *Houses*, but passing with unanimous consent, is a certain argument the *Houses* did not think there was any Law to exclude them. And therefore the *Authour* of the *Judicature* very well saith, *That had it not been for the Canon-Law, (for which he refers to the Synodal Constitutions at Westminster*

Selden's Bar.
pag. 6.
Rights of
the Bishops,
pag. 76.

minster 21 H. II. which is onely reviving the Council of Toledo's Canon,) they might have been present both by Common Law, and by the Law of God.

2. By Proxie, or one common Procurator to appear in Parliament for them, and to vote in the name of the whole Body. This was receiv'd and allow'd 21 R. II. upon the *Petition* of the House of Commons, because Judgments had been reversed without their concurrence. Against this the *Authour* of the Letter objects many things which are easily answer'd.

1. That hence it appears they could not be personally present. On the contrary, from hence it follows they had a Parliamentary Right to be present; although they said by Canon-Law they could not. Lett. p. 28.

2. That it was never practised but in this one Parliament. That is strange, when himself confesseth, that it passed for good Law 10 Ed. IV. Term. Pasch. n. 35. and pag. 78. the same is cited by Stamford Placit. Cor. l. 3. f. 153. To which judgment of the Lawyers, and the greatest of their time, (for Littleton was then Judge 10 Ed. IV.) we have a very extraordinary Answer pag. 79. called *Error Temporis*; which will equally make void the Law or Judgment of any Age. But is it possible, that should pass for

for *Law 10 Ed. IV.* which was never practised but once *21 R. II.* and the contrary practice had been onely allowed all the intermediate times ? Thus a short answer may be given to the *Constitution of Clarendon*, it was *Error Temporis* ; to the *allowing the Protestation 11 R. II.* it was *Error Temporis* ; and so on to the end of the *Chapter*. If there were any *Error Temporis* in this matter, it lay in this, that they took this *Precedent 21 R. II.* for a sufficient Ground, *that the Bishops should onely appear by Proxy in such Cases* ; whereas the *Canon-Law* being taken away since the *Reformation* as to these matters, their *Right of Personal* appearing doth return to them of course.

Lettr. p. 79.

3. That *this Parliament was repealed 1 H. IV.* But this I have answer'd already from his own words, wherein he acknowledges him to be an *Usurper*, and consequently the *Repeal* not made by a legal *Parlament*. And this *Repeal* was again taken off *1 Ed. IV.*

4. That it is not at all *Parlamentary*, for one or two men to represent a whole *Body*. The consequence then is, that they ought to enjoy their own *Personal Right*. All that we urge from hence is, that the *Bishops* kept up their *Right* still by their *Proxies* , when they thought the *Canon* would

would not allow voting in their *own Persons*.

IV. Some of his *Precedents* do prove, that after the *Protestations* and *Proxies*, they did assert their *own Personal Right*, and were present both at *Examinations*, and at the *whole Proceedings*.

I. At *Examinations*. As in the Case of Sir *William Rickill* 1 H. IV. who was Letr. p. 31. brought to Parliament before the King and the two Houses, the Lords Spiritual and Temporal and the Commons then assembled together. And he grants the Bishops were present at his Examination.

2. At the *whole Proceedings*, 28 H. VI. pag. 41. 10.
pag. 48. where he confesseth the Bishops were not onely personally present, but did act and bear a principal part in a Judicial proceeding in Parliament, in a Case that was in it self Capital, viz. of William de la Pole, Duke of Suffolk. Which is very fully related by the *Authour*, and needs no repetition. All that he hath to say to this, is, that the *whole Proceedings* were irregular, and not to be drawn into Precedent. Whereas a great Lawyer in his time, Sir E. C. made use of this as a sufficient Precedent in a Case of great moment, about Commitment upon a general Accusation. But there is not any Irregularity expressed or intima-

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ted in the *Bishops* appearing, and judging as other Lords did ; and the Judgment was not reversed because of their being there , as we have shewed others have been for their being absent.

V. None of all his *Precedents* do prove that the *Bishops* were ever excluded from sitting, by any *Vote* of the *House of Lords* or *Commons*. That they might *voluntarily withdraw*, we deny not ; or not be present at giving of Judgment out of regard to the *Canons* : which is all that is proved by the *Precedent* of *John Hall* 1 H. IV. of the *Earls of Kent* , *Huntington* , &c. 2 H. IV. of *Sir John Oldcastle* 5 H. V. and of *Sir John Mortimer* 2 H. VI. And this we have made appear was done by them out of regard to the *Canon-Law* ; the force of which being taken away by the *Reformation*, the *Bishops* are thereby restored to their just *Parlamentary Right*. Neither can any *Disusage* be a bar to that *Right*, since the ground of that *Disusage* was something then supposed to be in force, which is now removed by the *Reformation*. And I fear, if this kind of arguing be sufficient to overthrow the *Bishops Right* , much stronger of the same kind may be used to overthrow the *King's Supremacy* in matters of Religion.

So

pag. 32.

pag. 34.

pag. 37.

pag. 39.

So great care ought men to have, lest under the colour of a mighty zeal against Popery, they do overthrow the very Principles of our Reformation.

VI. There are *Precedents* upon Record in the *Rolls* of Parliament, which are not mention'd by the *Authour* of the Letter, which do prove that the *Bishops* were present at the Examination of *Treason* and *Capital Offences* in Parliament. And that within the time, wherein he pretends to give pag. 5. 51. an account of *all the Trials* recorded in the *Rolls*. Which shews how easily men pass by those things they have no mind to see.

I begin with 4 *Ed. III.* and I must doe him that right, as to say, that he doth not onely mention the Trial of Roger pag. 6. Mortimer, but of Sir Simon Bereford and others who were accused and tried in Parliament. But pretending, that the Roll of that Parliament is so defaced that it cannot be read, he runs to that of 28 *Ed. III.* and so gently passes over all the other Trials which are in the Record, and are more plain and expresse as to this matter. Among the Articles against Roger Mortimer, *Ed. I* of March, one is, that after he knew certainly the death of *Edm. II.* he made use of Instruments to perswade Edward Earl of Kent, that King's Brother, that he was

Rot. Parl.
4 Ed. 3. n. 3.

still living, and so drew him into a design for his Rescue; for which he was attainted at Winchester, and there suffer'd death for it. Among these Instruments the chief was one Mautravers, who for that Reason was attainted this Parliament: and the words of the Record are, Crestouz les Pieres, Counts & Barons assemblez a cest Parlement a West. si ont examine estraitement, & sur ce sont assentuz & accordez, que John Mautravers si est culpable de la mort Esmon Count de Kent, &c. All the Peers, Counts and Barons assembled in this present Parliament, upon strict examination do assent and agree, that John Mautravers is guilty of the death of Edmund Earl of Kent. Here we have the strict Examination of a Capital Case in Parliament, and all the Peers are said to be present at it. It is used as an argument by the Authour of the Letter, that in the case of Roger Mortimer, the Bishops could not be comprized under the general name of Peers, since the Barons are first in rank. But here the Peers are mentioned before Counts and Barons; and it will be impossible for him to assign any other Peers at that time, that were named before them, but the Prelats; who frequently are so put in the Records of that

pag. 7.

that time : as in the same Parliament *n. 12.*
Prelatz, Countes, Barons ; n. 13. Et
per assent des ditz Prelatz, Countes,
Barons ; so again n. 14. 15. 17. 24. 25.
 But the *Authour* of the *Letter* saith, *they* pag. 7.
cannot pretend to be Peers of the Realm.

Let him name then other Peers of the
 Realm at that time, who were neither
Counts nor *Barons*, and were before them.
 But if we are to judge who are *Peers* of
 the *Realm* by the *Records* of *Parlament*,
 I do not question but I shall make it evi-
 dent, that the *Bishops* were so esteemed ;
 and that some persons, who pretend to
 great skill in *Records*, either have not
 searched so diligently, or have not obser-
 ved so carefully about this matter as they
 might have done. But of this afterwards.

In the same *Parlament* Judgment was
 passed upon *Boges de Boyons, John Deveril,*
Thomas Gurnay, William Ocle ; but being
 by way of *Attainder*, and not upon particu-
 lar examination, which is mentioned in the
 case of *Mautravers*, I pass them over.

In the *Pleas* of the *Crown* held before
 the *King* in this *Parlament*, we find ano-
 ther Case which relates to our present de-
 bate ; viz. of *Thomas Lord Berkely* and
Knight, who was arraigned for the death
 of *King Ed. II. who came before the King*

in pleno Parlamento, in full Parliament, and there pleaded Not guilty; and declared he was ready to clear himself as the King's Court should advise. Then they proceeded to particular examination of him, how he could acquitt himself, being Lord of the Castle where the King was murdered, he being committed to his Custody and John Matravers. He pleaded for himself, that he was then sick at Bradley, and knew nothing of it. They charged him, that the Keepers of the Castle were of his own appointing; and therefore he was bound to answer for them. He answer'd, that they with Matravers having receiv'd the King into their custody, he was not to be blamed for what they did: and for this he put himself upon his Country. At the day appointed for his Trial, he appears again coram Domino Rege in pleno Parlamento; and the Jury returned him Not guilty. But because he appointed Gurney and Ocle to keep his Castle of Berkely, by whom the King was murdered, the King appoints him a day the next Parliament to hear his Sentence; and in the mean time he was committed to the custody of Ralph Nevil Steward of the King's House. In the next Parliament 5 Edw. III. n. 18. The Prelats, Earls and Barons petition the King,

King, that he might be discharged of his mainprisors : the which was granted, and a farther day given him to appear next Parliament. But we reade no more of him, till the Summons he had 14 Ed. III. as one of the Lords in Parliament. The great force of this Precedent lies in understanding what is meant by appearing before the King in full Parliament. If under this the Bishops be comprehended, then this will be an uncontrollable Precedent of the presence of the Bishops in the Examination of a Case Capital.

What the importance of this phrase of full Parliament is, will best appear by the use of it in the Records of that time. 4 Ed. III. n. 6. Et est assentiu & accorde per nostre Seigneur le Roi, & touz les Grantz en pleyn Parlement. Where it was agreed, that the proceedings at that time by the Lords against those who were not Peers should not be drawn into consequence; and that the Peers should be charged onely to try Peers. Which hath all the formality of an Act of Parliament: and therefore all the Estates were present, n. 8. Accorde est per nostre Seigneur le Roi & son Conseil en pleyn Parlement. Which was an Act of Pardon concerning those who followed the Earl of Lancaster.

5 Ed. III. n. 10. we have the particular mention of the *Bishops*, as some of those who do make a *full Parliament*. *Accorde est per nostre Seigneur le Roi, Prelatz, Countes, Barons, & autres Grantz du Roialm en pleyn Parlement :* and n. 17. *En pleyn Parlement si prierent les Prelatz, Countes, Barons, & autres Grantz de mesme le Parlement, a nostre Seigneur le Roi, &c.*

6 Ed. III. n. 5. the *Archbishop* of *Canterbury* made his Oration en pleyn *Parlement*, which is explained by en la presence nostre *Seigneur le Roi, & de touz les Prelatz, & autres Grantz.* n. 9. *Si est accorde & assentu per touz en pleyn Parlement :* who *those* were, we are told before in the same number, viz. les *Prelatz, Countes, Barons, & touz les autres somons a mesme le Parlement.* Which is the clearest explication of *full Parliament*, in the presence of all *those* who were *summon'd* to *Parlement*. From whence it follows, that where a *full Parliament* was mention'd at that time, the *Bishops* were certainly present; and consequently did assist at the Trial of *Thomas Lord Berkely*, who appeared before the King in *full Parliament* : as *Nich. de Segrave* did 33 Ed. I. and there the

the *Bishops* are expressly mention'd as present; as appears by what hath been said before concerning his Case.

5 H. IV. *Henry Hotspur*, Son to the *Earl of Northumberland*, was declared a *Traitour* by the *King* and *Lords* in full *Parlament*; and the same day, the *Father* was, upon examination, acquitted of *Treason* by the *Peers*. It is not said that this was done in full *Parlament*, as the other was: but there are several circumstances which make it very probable the *Bishops* were then present. (1.) When the *Earl of Northumberland* took his *Oath of Fidelity to the King*, he did it, saith the *Record*, upon the *Cross of the Archbishop*; which was to be carried before him, if he went out of the *House*. (2.) The *Archbishop of Canterbury* pray'd the *King*, that forasmuch as himself and other *Bishops* were suspected to be in *Piercie's Conspiracy*, that the *Earl* might upon his *Oath* declare the truth: who thereupon did clear them all. Which shews that the *Archbishop* was then present in the *House*. And for the same reason that he was present, we may justly suppose the other *Bishops* to have been so too. (3.) The *Earl of Northumberland* beseeched the *Lords* and *Earls* and *Commoners*,
that

Walsingh.
hyst. Angl.
pag. 366.

that if he brake this Oath, they would intercede no more with the King for him. Now the better to understand this, we are to consider, that H. IV. takes notice in his declaration upon the *Rebellion* of Sir Henry Piercy, that *the Earl of Northumberland and his Son gave out, that they could have no access to the King, but by the Mediation of the Bishops and Earls, and therefore did beseech them to intercede with the King for them.* It is not then probable, that those should be now left out, when the words are large enough to comprehend them, and no one circumstance is brought to exclude them. For that general one, of *their not being Peers*, will be fully refuted afterwards.

But that which puts this out of dispute is, (4.) that the Record saith, *n. 17. the Commons not onely gave the King thanks for the pardon of the Earl of Northumberland, but the Lords Spiritual and Temporal, in these remarkable words; Et auri mesmes les Cōes remercierment les Seigneurs Espirituels & Temporels de leur bon & droiturell judgment quilz avoient fait come Piers du Parlement:* And likewise the Commons gave thanks to the Lords Spiritual and Temporal for the good and right Judgment which they had given

ven in this case as Peers of Parliament. Which is a clear Precedent of the Bishops judging in a Capital Case, and that as Peers.

2 H. VI. n. 9. John Lord Talbott had accused James Boteler, Earl of Ormond, of sundry Treasons before the King and his great Council; and after, before John Duke of Bedford, Constable of England. The King takes advice of his Parliament about it; and then it is expressly said in the Record, *De avisamento & assensu Dominorum Spiritualium & Temporalium ac Communitatis Regni Anglie, in eodem Parlamento existent, facta fuit quedam abolitio delationis, nuntiationis, & detectionis predict, &c.* Here the King adviseth with the Lords Spiritual in an accusation of Treason; and therefore they must be present in the debates concerning it.

I leave now any considerate person to judge impartially on which side the Right lies. For on the one side,

1. There is the Constitution of Clarendon interpreted by H. II. and the Bishops at Northampton.

2. A Protestation of their Right enter'd, and allowed by King, Lords and Commons, 11 R. II.

3. A Reversing of Judgments owned by Parliament for want of their presence, 21 R. II.

4. A

4. A Preserving of their *Right* by *Proxie*, when they thought their Personal attendance contrary to the *Canons*.

5. A Bar to a total discontinuance of their personal *Right*, by an allowed *Precedent* 28 H. VI.

6. A Restoring them to their former *Right*, by removing of the force of the *Canon-Law* upon the *Reformation*.

7. No one *Law* or *Precedent* produced for excluding them, even in those *Times*, when they thought the *Canons* did forbid their presence.

8. Several *Precedents* upon *Record*, wherein they were present at *Examinations* and *Debates* about *Cases Capital*.

On the *other* side,

1. The *Precedents* are *General*, and *Negative*.

2. Or relating to such *Cases* wherein they are allowed to be present.

3. Or of *Judgments* condemned as *erroneous* by *Parlament*.

4. Or of *voluntary Withdrawing*, with *Protestation* of their *Right*, and making of *Proxies*.

5. Or of *not being present* at the passing of *Judgment* out of regard to the *Canon-Law*.

And now on which side the *Right* lies, let the *Authour* of the *Letter* himself judge.

CHAP. IV.

CHAP. IV.

The Peerage of the Bishops cleared ; how far they make a third Estate in Parliament. Objections against it answered.

TH E R E remain *Two* things to be considered , which are put in by way of *Postscript* by the *Authour* of the *Letter* : the one concerns the *Peerage* of the *Bishops*, the other their Being a *Third Estate* in Parliament.

I. Concerning their *Peerage*. To prove this *two Statutes* had been alledged, 25 *Ed. III. c. 6.* and 4 *H. V. c. 6.* and the opinion of *Judges* and *Lawyers* out of the *Year-Books*. But although these had been very significant, if they had been against them ; they have the hard fortune to signify nothing, when they are for them. A meer *Protestation* becomes good *Law*, very *substantial Law*, if it be supposed to make against the *Bishops*; and yet in that very *Protestation* the *Right of Peerage* is expressly challenged, (as well as it is asserted and taken for granted in the *Statutes* mention'd.) Is that part of the

the *Protestation invalid* ? and must nothing pass for *Law* but what is against them ? Is it credible that a *Right of Peerage* should be owned and received, in *Acts of Parliament*, in *Protestations*, in *Year-Books*, time after time ; and no opposition made against it by the *Temporal Lords* all that time, in case they believed the *Bishops* had challenged that which by no means did belong to them ? Did not the *Temporal Lords* understand their own *Privileges* ? or were they willing to suffer the *Bishops* to assume their *Titles* to themselves without the least check or contradiction, and let their *Protestations* be enter'd in the *Rolls of Parliament* without any contrary *Protestation* ? I do not question but the *Authour* of the *Letter* did read the *Bishops Protestation* at large in the *Parliament-Rolls* 11 R. II. And can any thing be plainer, then that therein they challenge a *Right of Peerage* to themselves, *ut Pares Regni—cum ceteris Regni Paribus, &c* ? And this *Protestation*, he saith, was enter'd by consent of the *King*, *Lords Temporal*, and *Commons* ; as is expressed in the *Rolls*. Were the *Temporal Lords* awake ? or were they mean and low-spirited men ? No ; they were never higher then at this time,

time, when the *King* himself durst not withstand them.) What could it be then, but meer conviction of their just *Right* of *Peerage*, which made them suffer such a *Protestation* as that to pass, after so solemn and unusual a manner, and to be enrolled par *Commandment du Roy*, & assent des *Seigneurs Temporels & Communs*; as it is in the *Rolls*? Was all this onely a *Complement to the Potent Clergy at that time*? But who can imagine that *King*, *Lords* and *Commons* should complement at that rate, as to suffer the *Bishops* to challenge a *Peerage* to themselves in *Parlament*, if they had not an undoubted *Right* to it? This one argument is sufficient to convince any reasonable man. Especially when we consider, that in the same *Parlament*, before the *Protestation* was brought in, a motion was made n. 7. by all the *Lords Spiritual and Temporal*, which they claimed come leur libertez & franchise, as their *Liberty and Privilege*, that all weighty matters moved in this *Parlament*, or to be moved in any to come, touchant *Pieres de la Terre*, concerning the *Peers* of the *Realm*, should be determin'd, adjudged and discussed by the course of *Parlament*; and not by the *Civil*, nor by the *Common Law*

Law of the Land, used in inferiour Courts of the Realm. The which Claim, Liberty and Franchise, the King most willingly allowed and granted in full Parliament. From whence it is evident, that the King and Parliament did allow the Right of Peerage in the Lords Spiritual; for it is said expressly in the Record, that all the Spiritual as well as Temporal Lords joyned in this Claim: which being allowed them in full Parliament, is an evidence beyond contradiction of their Right of Peerage.

Lett. pag. 85.

But against this no less is pretended then Magna Charta, viz. that every man who is tried at the King's Suit must be tried by his Peers. Now if a Bishop be tried for any Capital offence, he is tried by the Commoners, and that is the Common Law of England; it hath ever been so, never otherwise: then must Commoners be his Peers, and he and Commoners must be Peers.

To this Argument, how strong soever it appears, these two things may be justly answer'd.

1. That the matter of Fact cannot be made out, that a Bishop hath always been tried by Commoners.

2. That if it could, it doth not overthrow their Peerage in Parliament.

(1.) That

(1.) That the matter of Fact cannot be made out, *viz. that if a Bishop be tried for a Capital Offence, he is tried by the Commons; that it hath ever been so, never otherwise.* For in 15 Ed. III. John Stratford, Archbishop of Canterbury, was at the King's Suit accused of Capital Crimes, *viz. of no less then Treason, and Conspiracy with the French King.* He put himself upon his Trial in Parliament. A Parliament was called; and he at first refused admission into the House; which he challenged *tanquam major Par Regni post Regem, & Vocem primam in Parlamento habere debens,* as the first Peer of the Realm after the King, and having the first Vote in Parliament. Upon which, and the intercession of his Friends, he is admitted into the House; and there he put himself upon the Triall of his Peers. At which time a great Debate arose in the House, which continued a whole Week; and it was resolved, that the Peers should be tried onely by Peers in Parliament. Whereupon the Archbishop had 12 Peers appointed to examine the Articles against him: 4 Bishops, *viz. London, Hereford, Bath, and Exce-ter;* 4 Earls, *Arundel, Salisbury, Huntingdon, and Suffolk;* and 4 Barons, *I Percy,*

Antiq. Brit.
pag. 223.

Percy, Wake, Bassett, and Nevil. Here we have all that can be desired in the case. Here is a *Bishop* tried at the *King's Suit*, and for a *Capital Crime*; and yet not tried by *Commoners*, but by his *Peers*, and that after long debate in the *House* concerning it. If it be said, *that he was tried by the Lords as Judges in Parliament, and not as his Peers*; it is answer'd, 1. Then *Bishops* are *Judges in Parliament* in *Cases Capital*: for so this was, and 4 *Bishops* appointed to examine it. 2. The Debate in the *House* was about *Trial of Peers by their Peers*; and upon that it was resolved, that the *Archbishop* should be tried by the *House*. For the *King* designed to have him tried in the *Exchequer* for the matters objected against him, and the *Steward* of the *King's House* and *Lord Chamberlain* would not suffer him to enter into the *House of Lords*, till he had put in his *Answer* in the *Exchequer*. Upon which the great *Debate* arose; and therefore the *Resolution* of the *House* is as full a *Precedent* in this *Case* as can be desired.

I do not deny, that the *Rolls* of *Parliament* of that year seem to represent the 12 *Peers*, as *Birchington* calls them, not as appointed to examine the particular
Case

Case of *Stratford*; but to draw up in form the desire of the Peers as to a Trial by their Peers, in Parliament: the which is extant in the *Record 15 Ed. III. n. 7.* However, this Argument doth not lose its force as to the Peerage of the Bishops; but it is rather confirmed by it. For there they pray the King, by the Assent of the Prelats, Counts and Barons, that the Peers of the Realm may not be judged but in Parliament, & per leur Piers, and by their Peers: and after it follows, *that they may not lose their Temporalties, Lands, Goods and Chattels, &c.* Who were capable of losing their Temporalties, but the Prelats? Therefore this Law must respect them as well as others. As farther appears not onely by the Occasion, but by the Consequent of it. For it follows, *n. 8.* that the *Archbishop of Canterbury* was admitted into the King's Presence, and to answer for himself in Parliament devant les Piers, before his Peers: which the King granted. So that the *Rolls of Parliament* put this matter beyond contradiction.

In 21 R. II. *Thomas Arundel, Archbishop of Canterbury*, was impeached of High Treason before the King and Lords in Parliament. The King's answer was, *That forasmuch as this Impeachment*

did concern so high a Person, & Pier de son Roialm, (it is in the Record, but left out in the Abridgment) and a Peer of the Realm, the King would be advised. But soon after he was condemned for Treason by the House, the Major of the Bishops, Sir Tho. Percy, giving his Vote. The force of this doth not lie barely in his being impeached before the House of Peers in time of Parliament ; but that the King called him in his Answer a Peer of the Realm.

pag. 192.

Coke 2. Inst.
c. 29. p. 50.

Sir J. M.
Arg. concern-
ing the
Jurisdiction
of the Peers,
in Skinners
Case.

And because two Laws were already passed, the one, *that Peers were to try none but Peers*, 4 Ed. III. n. 6. the other, *that Peers were to be tried onely by their Peers*, 15 Ed. III. n. 7. the former of these, the Authour of the *Jurisdiction of the House of Peers* asserted (one well known to the Authour of the Letter) would have onely looked on as a Temporary Order of the House. But our greatest Lawyers are of another opinion. And an eminent Lawyer still living urged this as an Act of Parliament, because it is said, *that the King in full Parliament assented to it* : and he added, *that the words are both Affirmative and Negative; they shall not be bound, or charged to try any other then Peers, but be thereof discharged; and that therein*

therein they declare it to be against Law for them to exercise Jurisdiction on those who were not their Peers. From whence it follows, that since *Stratford* and *Arun-
del*, Archbishops of *Canterbury*, were allowed to be tried by the House of *Peers*, (without Impeachment from the *Com-
mons*) they were looked on as *Peers* by the whole House.

The latter Act, the same *Authour* cannot deny to be a binding Law; but he hath a strange fetch to avoid the force of ^{pag. 193.} it; viz. that this Law was made with respect to the Case of *Roger Mortimer* 4 Ed. III. and not to the Case of *Stratford* then in Agitation: which is without all colour of Reason. For the Case then was of a different nature, viz. about the *Peers* trying those who were not *Peers*, as *Sir Simon Bereford*, &c: but here the case was, whether *Peers* should be tried by any others then their *Peers*; and the *King* granted they should not. Now upon this *Stratford* was allowed to be tried by his *Peers* in Parliament; and therefore this Trial upon these Acts is an invincible Argument of the *Peerage* of the *Bishops*.

In 28 H. VI. when *William de la Pole*, Duke of *Suffolk*, waved being tried by his *Peers*, and submitted to the *King's*

Mercy ; the Record saith , (as the *Authour* of the Letter himself confesseth) that *Viscount Beaumont*, on the behalf of the **Lords Spiritual** and **Temporal**, and by their advice, assent and desire, moved the **King**, that a Protestation might be enter'd in the **Parlament-Roll**, that this should not be, nor turn in prejudice nor derogation of them, their **Heirs**, ne of their **Successours** in time coming ; but that they may have and enjoy their **Liberties** and **Freedom**s as largely as ever their **Ancestours** and **Predecessours** had or enjoy'd them before this time. Which **Sir R. Cotton** more briefly expresseth, n. 52. that neither they nor their **Heirs** should by this example be barred of their **Peerage**. The *Authour* of the Letter more fully puts in **Successours**, as well as **Heirs** ; for this Protestation was made in behalf of the **Lords Spiritual** as well as **Temporal**. But very unfairly leaves out the most material words in the Record, viz. [after **Freedom**s,] in case of their **Peerage**. And I appeal to the *Authour* himself, whether these words be not in the Record ; and with what ingenuity they are left out, I cannot understand. I do not charge the *Authour* of the Letter himself with this ; but whosoever searched the **Records** for him, hath dealt very

unfaithfully with him. And I suppose, if he had seen this passage himself, he would never have so peremptorily denied the *Peerage* of the Bishops; nor asserted with so much assurance, that they are *onely to be tried by Commoners*, and that it was always so, and never otherwise.

(2.) Suppose the *Bishops* have been tried by *Commoners out of Parliament*, this doth not take away their *Right of Peerage in Parliament*. For all our dispute is concerning the *Right of their Peerage in Parliament*; and if that be allowed, we are not to dispute concerning the difference that in some respects may arise by Custom, or practice of Common Law, between *Peers by Descent*, and *Peers by Tenure in Right of their Baronies*. And therefore the *Authour of the Peerage of the Lords* pag. 3, 4, &c. *Spiritual* might have spared all the needless pains he takes about this: for we do not contend that they have an *Inheritable Peerage*, but that they are *Peers in Parliament*, having a *Right to sit and judge there by virtue of their Baronies*.

But from hence he undertakes to prove, that by *Magna Charta* they cannot be *Judges of such who are ennobled in Blood*. This comes home to our pre-

(132)
sent business, and therefore must be considered.

pag. 4.

1. He saith, that he who hath onely a *Prædial* or *Feudal*, and not *Personal*, *Peerage*, can have no *Jurisdiction* but such as is *suitable* to the nature of his *Peerage*; and therefore can onely extend to matters of property and possession, and not to matters of *Bloud*. But that this is a very trifling and ill-consider'd argument appears by this, that he grants a *Lord Keeper*, *Lord Privy Seal*, *Lord Treasurer*, to be *Peers* by their *Offices*; for, as he speaks, *after Regradation* their *Peerage* is ended: and he will not deny that these may sit as *Judges* in *Capital Cases*, although they be *Peers* onely by their *Offices*. Those that are *Peers* in *Parliament* have *Right* to judge in all *Cases* that belong to the *Judicature* of *Parliament*.

pag. 5.

2. He saith, that the *Reason* of *Magna Charta* is, that the *Judges* and *Prisoner* may be under the same *Circumstances*. But this kind of arguing as well excludes a *Lord Keeper*, who is no *Baron*, as a *Bishop*; and supposes that mens capacity for Judgment depends upon perfect equality of *Circumstances*: whereas *Knowledge* and *Integrity* go farther towards constituting

tuting one that is a *Peer* but in one respect, a just Judge, then *bare Inheritance of Honour* can do. But to give a full Answer to this *Argument*, on which that *Authour* lays so much weight, and challenges any Person, to give a rational account wherein the advantage of a man's being tried by his *Peers* doth consist; I shall (1) shew that this was not the *Reason* of Trial by *Peers*; (2) give a brief account of the true and original *Reason* of it.

[1.] That this was not the *Reason*.

1. Not in the Judgment of the *Peers themselves*, as that *Authour* hath himself sufficiently proved, when he takes so much pains to prove p. 3. that a *Writ of Summons* to Parliament doth not ennoble the *Bloud*; and consequently, doth not put persons into equality of Circumstances with those whose *Bloud* is ennobled: and yet he grants, that those who sate in the *House of Peers* by virtue of their *Summons* did judge as *Peers*; as is manifest from his own *Precedents* p. 15. from the 4 *Edm. 3.* From whence it follows, that this was not thought to be the *Reason* by the *Peers* themselves in Parliament.

2. That this was not the *Reason* in the Judgment of our greatest *Lawyers*; because they tell us, that where this *Reason*

son

son holds, yet it doth not make men Judges. As for instance, *those who are ennobled by Bloud, if they be not Lords of Parliament, are not to be Judges in the case of one ennobled by Bloud. One-ly a Lord of the Parliament of England,* 2 *Instit. p. 48.* *saith Coke, shall be tried by his Peers being Lords of Parliament; and neither Noblemen of any other Country, nor others that are called Lords, and are no Lords of Parliament, are accounted Pares Peers within this Statute. Therefore the Parity is not of Bloud, but of Privilege in Parliament.*

Coke 2 *Instit.* p. 49.
Selden's *Titles of Honor*, 4to.
pag. 347.

3. The Practice it self shews that this was not the Reason. For this Reason would equally hold whether the Trial be at the *King's Suit*, or the *Suit of the party*: but in the latter case, as in an *appeal for Murther*, a man whose bloud is ennobled must be tried by those whose bloud is not ennobled; even by an *Ordinary Jury of 12 men*. And I desire our *Author* to consider what becomes of the *inheritable quality of Bloud* in this case, when Life and Fortune lies at the mercy of 12 substantial Free-holders? who, it is likely, do not set such a value upon Nobility as Noble-men themselves do: and yet our Law, which surely is not against

gainst *Magna Charta*, allows an *Ordinary Jury at the Suit of the party* to sit in Judgment upon the greatest Noble-men. Therefore this *Reason* can signifie nothing against the *Bishops*, who are *Lords in Parliament*, as I have already proved.

[2.] I shall give a brief account of the true and original *Reason* of this *Trial by Peers*; without which, that *Authour* it seems is resolved to conclude, *that the Jurisdiction of the Bishops in Capital Cases is an abuse of Magna Charta, and a Violation offer'd to the Liberties of English Subjects.*

As to the general Reason of the *Trial by Peers*, it is easie to conceive it to have risen from the care that was taken, to prevent any unfair proceedings in what did concern the Lives and Fortunes of men. From hence *Tacitus* observes of the old *Germans*, that *their Princes, who* De Morib. Germ. c. 12. *were chosen in their great Councils to doe justice in the several Provinces, had some of the People joyned with them, both for Advice and Authority.* These were *Assessors* to the Judges; that mens lives and fortunes might not depend on the pleasure of one man: and they were chosen out of the chief of the People, none but those who were *born free* being capable of

H. Meibom.
de Irmen-
sä, a. 4.

of this honour. In the latter times of the *German State*, before the subduing it by *Charlemagn*, some learned men say, *their Judges were chosen out of the Colleges of Priests, especially among the Saxons*. After their being conquer'd by him, there were 2 Courts of Judicature established among them, as in other parts of the *German Empire*.

1. One *ordinary* and *Popular*, viz. by the *Comites*, or great Officers sent by the Emperour into the several *Districsts*; and the *Scabini*, who were Assistants to the other, and were generally chosen by the People. The number of these at first was uncertain; but in the *Capitulars* they are required to be *seven*, who were always to assist the *Comes* in passing Judgments. But *Ludovicus Pius*, in his second *Capitular*, A. D. 819. c. 2. enlarged their number to 12. And if they did not come along with him, they were to be chosen out of the most substantial *Free-holders* of the *County*: for the words are, *De melioribus illius Comitatus suppleat numerum duodenarium*. This I take to be the true Original of our *Juries*. For our *Saxon Laws* were taken very much from the *Laws of the Christian Emperours* of the *Caroline Race*, as I could at large prove,

prove, if it were not impertinent to our business; and thence discover a great mistake of our Lawyers, who make our ancient *Laws* and *Customs* peculiar to our selves. As in this very case of *Trial by Peers*, which was the common practice of these parts of the World. Therefore *Otto Frisingensis* takes notice of it as an unusual thing in *Hungary*; *Nulla sententia à Principe, sicut apud nos moris est, per pares suos exposcitur — sola sed Principis voluntas apud omnes pro ratione habetur*: that they were not judged by their Peers, but by the Will of their Prince. Which shews, that this way of Trial was looked on as the practice of the Empire, and as preventing the inconveniences of arbitrary Government. And it was established in the *Laws* of the *Lombards*, and the *Constitutions* of *Sicily*. In the one it is said to be *Judicium Parium*; in the other, *proborum virorum*. In the *Saxon Laws* of King *Ethelred* at *Wanting*, c. 4. 12 *Free-men* are appointed to be sworn to doe Justice among their neighbours in every Hundred. Those in the *Laws* of *Alfred* are rather 12 *Compurgators* then *Judges*; however some make him the *Authour* of the *Trial by Peers* in *England*. But by whomsoever it was brought into request here,

it

Otto Fri-
sing. de gestis
Fred. l. 1.
c. 31.

Leg. Longo-
bard. l. 3.
tit. 8. § 4.
Constit. Si-
cil. l. 1.
tit. 44.

Alfred. vit.
l. 2. p. 72.

it was no other way of *Trial*, then what was ordinary in other parts of *Europe*; and was a great instance of the moderation of the Government of the *Northern Kingdoms*.

2. There was an extraordinary or *Royal Court of Judicature*: and that either by way of *Appeal*, which was allowed from inferiour Courts; or in the *Causés of Great men*, which were reserved to this *Supreme Court*. In which either the *King* himself was present, or the *Comes Palatii*, who was *Lord High Steward*; and all the *Great persons* were *Assessours* to him. In such a *Court Brunichildis* was condemned in *France*; and *Tassilo* Duke of *Bavaria* in the *Empire*; and *Ernestus*, and other *Great men*, *A. D.* 861; and *Erchingerus* and *Bartoldus* under *Conradus*, the last of the *French Race*. And among the *Causés* expressly reserved for this *Supreme Court*, were those which concerned the *Prelats* as well as the *Nobles*. *Ut Episcopi, Abbates, Comites, & potentiores quique, si causam inter se habuerint, ac se pacificare noluerint, ad nostram jubeantur venire presentiam: neque illorum contentio aliubi judicetur.* But in this *Court* they challenged that as their privilege to be tried by their *Peers*; who were called

Aimoin. l. 4.
c. 1.

Rhegin. l. 2.

Capit. l. 3.
c. 77.

called *Pares Curiae*. So the Emperour *Sigismund*, in his *Protestation* before the States of the Empire ; *Cum secundum juris communis dispositionem, nec non usum, morem, stylum & consuetudinem sacri Romani Imperii, feudalis contentio per Dominum feudi, ac Pares Curiae terminanda sit, &c.* And again, *nisi Parium nostrae Curiae arbitrio*. So likewise in France, as *Tilius* saith, *Hæc judiciorum ratio, ut de causis feudalibus judicent Feudales Pares, in Gallia est perantiqua*. So in *Fulbertus* one Count sends word to another, that their Cause should not be determin'd, *nisi in Conventu Parium suorum*. And many other examples might be produced : but these are sufficient to make us understand the true Original of this Right of Peerage ; which was from the Feodal Laws ; and all those who held of the same Lord, and by the same Tenure, were said to be *Pares Peers*. And therefore since the Bishops in England were Barons by Tenure ever since William I. by consequence they were Peers to other Barons ; and had the same original Right of Trial by other Barons as their Peers, holding by the same Tenure, and sitting in the same Court. And thus I hope I have given (what that Authour so impatient-

Sigism. Orat.
A.D. 1434.

Tilius de rebus Gallicis.

Fulbert.
cp. 96.

patiently desired, viz.) a *rational account* of the *Trial by Peers* ; and have thereby shewed, that this is so far from being any disadvantage to the *Bishops Cause* , that it adds very much to the *Justice* of it.

And that this is so far from being a *violation of Magna Charta*, that it is within the intention and meaning of it, I thus prove. In the 14. ch. of *Magna Charta* we read, *Comites & Barones non amercientur nisi per Pares suos* : but by the Common Law the Amerciament of a *Bishop* is the same with that of a *Lay-Baron* ; and therefore in the sense of the Law, they are looked on as *Peers*. And all the *Parlamentary Barons*, whether *Bishops* or *Abbots*, were amerced as *Barons*. Thence

Clauſ. 15
E. 1. m. 12.

15 *Edm. 2.* a Writ was directed to the Justices of the Common Pleas, that they should not amerce the *Abbot of Crowland* *tanquam Baro*, because he did not hold *per Baroniam aut partem Baronie*. And it is confessed by the most learned Lawyers,

Selden of
Baron. p. 152.

that the *Lords Spiritual* do enjoy the same legal Privileges, in other respects, which the Temporal Barons do ; as in *real Ac-*

Titles of Hon.
4^{to}. p. 347.

tions to have a Knight returned in their Jury ; as to a day of Grace ; hunting in the King's Forests ; *Scandalum Magnatum*, &c. Now since the Law of Eng-
land

land allows onely a double Parity, viz. as to Lords of Parliament, and Commons, whether Knights, Esquires, Gentlemen, or Yeomen, without any consideration of the great inequality of circumstances among them; (Yeomen having as little sense of Gentility, as Commons can have of the privileges of Nobles;) it is apparent that this Trial by Peers was not founded upon equality of circumstances; and that in all reason, those who do enjoy the legal Privileges of Peers, are to be looked on as such by Magna Charta.

But the great Objection is, that the Lawyers are of another opinion, as to this Trial by Peers; and not onely the common sort, who take all upon Trust which they find in the modern Law-Books, but those who have searched most into Antiquity, such as Mr. Selden and Sir Edw. Coke.

To this therefore I answer.

1. The Author of the Peerage, &c. proves pag. 6. the Bishops are not Peers, because not to be tried by Peers. This consequence Mr. Selden utterly denies; for he saith, it is true and plain that the Bishops have been Peers. For which he quotes the Bishop of Winchester's Case, who was question'd in the King's Bench for leaving the Parliament at

Privil. of Baronage,
pag. 143.

Salisbury in the beginning of Ed. III. and he pleaded to the declaration, *quod ipse est unus e Paribus Regni*, that he was one of the Peers of the Realm: which, he saith, was allowed in Court. And from other Book-cases and Parliament-Rolls he there evidently proves, that the Bishops were Peers: which he not onely asserts in that confused *Rhapsodie*, which went abroad under his name; but in his elaborate Work of the last Edition of his *Titles of Honour*, in which he corrected and left out the false or doubtfull passages of his first Edition. And among the rest, that passage wherein this *Authour* triumphs, *A Bishop shall not be tried by Peers in Capital Crimes*. The same thing I confess is said in the *Privileges of the Baronage*; which he there calls a point of Common Law as it is distinguished from Acts of Parliament; i. e. the custom and practice hath been so. And the onely evasion he hath for *Magna Charta* is this; that it is now to be interpreted according to the current practice, and not by the literal interpretation of the Words. Which is an admirable answer, if one well considers it, and justifies all violations of *Magna Charta*, if once they obtain and grow into Custom. For then, no matter for the express words of *Mag-*

Titles of Honour, Sec.
Part. ch. 5.
§ 32. in
Marg.

pag. 153.

na Charta, if the contrary practice hath been received and allowed in legal proceedings. This is to doe by *Magna Charta*, as the Papists doe by the *Scriptures*, viz. make it a *meer Nose of Wax*, and say it is to be interpreted according to the *Practice of the Church*.

2. Some things are affirmed about this matter with as great assurance as this is, which have not been the constant practice. *Coke* is positive, that *Bishops* are not ^{3. Instit.} to be tried by their Peers; but so he is in ^{Page 30.} the same page, that a *Nobleman* cannot wave his Trial by his Peers, and put himself upon the Trial of the Countrey: Whereas it is said in the *Record 4 Ed. III.* that *Thomas Lord Berkely*, *ponit se super Patriam*, put himself upon his Countrey, and was tried by a Jury of 12 Knights. And 28 H. VI. the *Duke of Suffolk* declined the Trial of his Peers, and submitted to the King's mercy. By which it appears, that this was a *Privilege* which was not to be denied them, if they challenged it; but, at least before 15 Ed. III. they might wave it if they pleased; and after that too, if they were tried out of *Parlament*. For this Trial by Peers was intended for a security against arbitrary Power in taking away mens Lives; and therefore it was

Godwin.
vit. Rich.
Scroop Ar-
chiep. Eborac.

allowed at the King's Suit; but not at the Suit of the Party. But if Bishops were tried out of Parliament, and did voluntarily decline the challenge of this Privilege, this is no argument at all against their Right of Peerage: and so I find some say it was in the Case of Fisher, Bishop of Rochester, in H. VIII's time; which is the great Precedent in the Law-Books.

3. The method of Proceeding as to the Trial of Bishops by Common Juries, while the Pope's Power continued in England, is not so clear, that any forcible Argument can be drawn from thence. Because the Bishops then looked on themselves as having no Peers, out of Parliament, in point of Judgment, but Bishops. As in the famous Case of Adam Bishop of Hereford, under Edm. II. who was rescued from the King's Bench by his Brethren the Bishops, because they looked on his appearing there as a Violation of the Liberties of the Church. I do not go about to defend these Proceedings; but I am sure the Author of the Peerage, &c. very much misrepresents this business: for he makes it as if the Bishop were legally convicted in Court by a common Jury, and that after conviction he was deliver'd to the Archbishop, to the intent, as he supposes, that

that he should be degraded. Whereas, in truth, the *Bishops* carried him out of the Court, without his giving any Answer to the Endictment; and when he was absent, the King commanded the Jury to bring in their Verdict; and without ever being heard to make any Defence for himself, they found him guilty in all the Articles laid to his Charge. That *An-*

Walsingh.
pag. 119.

thour very freely bestows the terms of *Impudence* on the *Bishops* of that time, and *Ignorance* on those who go about to defend them: but I desire to know whether of these two makes a man thus misrepresent a matter of fact? For it was so far from being true, that upon *Conviction* he was deliver'd to the Archbishop to be degraded; that he never appeared in Court after, but continued under the Archbishop's care, till, after a while, he fully reconciled him to the King; notwithstanding the Jury found him guilty of Treason. I desire to be informed, whether we are to understand *Magna Charta* by such a Trial as this? Whether he were judged by his Peers, I know not; but I am sure he was not by the Law of the Land; which I think is as good a part of *Magna Charta* as the other. And this, our Historians tell us, is the First Instance

Antiq. Can-
tuar. in Wals.
Raynolds
pag. 215.
ed. Han.

of any Trial of this kind, of any Bishop in England: which hath too much of force and violence in it, to be a good Interpreter of *Magna Charta*.

The Second Precedent is verbatim out of Mr. Selden concerning John de Ille and the Bishop of Ely his Brother; which concerns such matters, wherein himself confesses the *Privilegium Clericale* was allowed; and the Record saith, the Archbishop entering his plea, that he was to be deliver'd to him as a member of his Church, he was accordingly deliver'd, after the Jury had given in their Verdict. Which shews, indeed, the good will that was then used, to take away even the allowed Privilege of the Clergy by common Juries. And this is another stout Interpreter of *Magna Charta*; when *Brañon*, *Briton*, *Fleta*, *Stat. West. 1. Articuli Cleri c. 15.* are confessed, even by Sir Edw. Coke, to be so clear in the Clergie's behalf in these matters.

The Third Precedent, which is likewise out of the same Authour, is of Thomas Merks, Bishop of Carlisle; who, for his fidelity to R. II. and the true Heirs of the Crown, against the Usurpation of H. IV. was found guilty of Treason by a common Jury. But Mr. Selden

2. Instit.
f. 633, &c.

is so ingenuous as to take notice, that the Writ directed to the Justices had in it a *Non obstante* to a Statute lately made at Westminster; *Licet in Stat. apud Westm. nuper edito inter cetera continetur, quod nullus Archiep. nec Episcopus coram Justiciariis nostris occasione alicujus criminis impetatur, absque speciali præcepto nostro, quousque, &c.* Which was read in Court: but the Judges urging, that the *Liberties of the Church* did not extend to high Treason, then it is said, he did *ponere se super Patriam*; just as Thomas Lord Berkely did 4 Ed. III. This is the onely Precedent that proves that a Bishop, before the time of H. VIII. did put himself upon a common Jury: and yet we find as good a Precedent of this sort, concerning an allowed Peer of the Realm. And whether this single Precedent be sufficient to interpret *Magna Charta*, against the plain sense of the words, and to make a constant practice, I leave any rational man to judge.

But if this were yielded in Cases of high Treason, wherein the Privilege of Clergy holds not; (especially since the Statutes 25 Ed. III. c. 4. and 4 H. IV. c. 2, 3.) Mr. Selden tells them, that there is no consequence from hence, be-

Camden.
Brit.
pag. 123.

cause they are not to be tried by Peers; therefore they are not Peers: since the Common Law may limit this Privilege of Peers in one particular case, which may hold in all others. As it is no diminution to the Peerage of the Temporal Lords, to be tried by a common Jury at the Suit of the Party. I conclude the Answer to this Argument, as Mr. Camden doth his Discourse about this subject; who having proved that the Bishops do enjoy all other Privileges of Peers, except this of being tried by them, (which he seems to attribute to a kind of Revenge upon them, for pleading such exemptions by the Canon-Law) after all, he leaves it to the Lawyers to determine, whether this be *juris exploitati*. The meaning of which I am sure is not, as the Author of the Letter expresseth it, that it was always so, and never otherwise.

But the great difficulty to some is, that a *Prædial* or *Fendal* Barony doth not ennoble the Bloud; and therefore can give no Right of Peerage. Whereas it is well known, that all the Baronies of England were such from the Conqueror's time, till after the Barons Wars, when, for Reason of State, it was thought necessary to make the Nobility more dependant on the

the Crown. And all that were *Barons* were *Pares*, i. e. *Peers*. So *du Fresn* quotes an old Poem of the *Common Law* of *England*,

Barons nous appellons les Piers del Realm.

Glossar. v. Pares.

In *France*, from whence our *Baronies* first came, *Ecclesiastical* Persons with *prelatical Baronies* are thought as capable of *Peerage* as any. For, there at first all the *Barones Regni* (who both in *France* and *England* were the same with the *Barones Regis*, however some of late have distinguished them) sat in the great Council, and all publick Affairs passed through them; and they were judged by their own Order: and these were called *Partes Regni*, among whom the *Bishops* were comprehended. At last *Lewis VII. A. D. 1179* (as most Authours agree) chose Twelve out of the great number of the *Peers of France*; of which half the number were *Bishops* who held *feudal Baronies* of the *King*; and the *Archbishop of Rheims* is the First of the whole Number. And because these enjoy'd greater Privileges than other *Peers*, their number was increased by particular *Favour*; but the ancient *Rights of Peerage* remained to all the *Barons* of the *Realm*. In *Scotland*,
when

Walsingh.
ad A. D.
1296.
Mat. Westm.
A. 1295.

when they appointed *Twelve Peers* for the *King's Council*, they were 4 *Bishops*, 4 *Earls*, 4 *Barons*. So that in the neighbour Nations *Feodal Baronies* were never thought inconsistent with *Peerage*: and we have as little Reason to think them so with us; since to this day, the *Bishops* do enjoy not onely the great Right of *Peerage*, of sitting and voting in the *House of Peers*, but have some personal Privileges of *Peers* allowed them by the *Common Law*, as is already shewed.

II. The last thing to be considered is, the *Capacity* in which they sit in the *House*, whether as a *Third Estate* or not? The *Author* of the *Letter* not onely denies it, but opposes it with great vehemency, and offers many *Authorities* and *Reasons* against it. All which must be weighed with the same calmness and impartiality, which hath been hitherto used in this Discourse. And there are Three things to be distinctly handled for the clearing of this Matter: 1. His *Foundation*; 2. His *Authorities*; 3. His *Reasons*.

(1.) His *Foundation* whereupon he builds; which is, that the *Bishops* sit in the *House* onely in the capacity of *Temporal Barons*; *William the Conquerour* having brought

brought the Temporalities of Bishops under the condition of Baronies. That they do sit there in the Right of their Baronies, was yielded at first; but whether they sit there onely in that capacity, is the thing in Question.

And here I crave leave to make use of this Author's distinction, and to apply it to this purpose; viz. of the Bishops sitting in the House in a Judicial way, and in the Legislative way. When they sit in the Judicial way, as Members of the Supreme Court of Judicature, I grant that they sit onely in the capacity of Temporal Barons; as appears by the Constitution of Clarendon, where the King requires their attendance in Judicature as his Barons. But that in the Legislative way they have a farther Capacity, as representing a Third Estate in Parliament, I prove by these Arguments.

[1.] During the Vacancy of Bishopricks, Writs were sent to the Guardians of the Spiritualties, to attend the Parliament.

Which Mr. Selden, who cannot be suspected for partiality in this matter, saith, *Titles of Honor, p. 2. ch. 5. n. 17.* is obvious in the Rolls of Parliament; and 23. which he cannot deny to be an evidence of the Bishops sitting in Parliament as Bishops, and as Spiritual onely, as they did in the

the Saxon times, in the Wittena gemot. So likewise, the Vicars-general had Writts when the Bishops were beyond Sea. But neither of these could sit in Parliaments as Temporal Barons.

But because so much depends on the proof of this, and no man hath yet undertaken it, I shall bring clear Testimonies of the constant practice of it, from the Records of the Tower.

24 Edw. I. Writts were directed *Custodi Archiepiscopatus Eborum, sede vacante; & Electo Menevensi, vel ejus vices gerenti, ipso agente in partibus transmarinis.*

27 Ed. I. *Custodibus Episcop. Lincoln. sede vacante; & Capitulo Eccles. B.P. Eborum, Custodibus Spiritual. ejusdem Diocesis. sede vacante.*

5 Ed. II. *Vicario generali Archiep. Eborum, ipso Archiepiscopo in remotis agente.*

6. Ed. II. *Custodi Archiepiscopatus Cantuar. sede vacante.*

7 Ed. II. To the same, & *Custodi Episcop. London. sede vacante.*

1 Ed. III. *Custodi Spiritualitatis Archiep. Cantuar. sede vacante:* and twice the same

2 Ed. III.

7 Ed. III. *Rex dilecto sibi in Christo Priori*

Priori Eccles. Christi Cantuar. Custodi Spiritualit. Archiep. Cantuar. sede vacante.

10 *Ed. III. Custodi Spirit. Episcop. Norwic. sede vacante.*

11 *Ed. III. Custodi Spirit. Episcop. Cicestr. sede vacante; & H. Episcopo Lincoln. vel ejus Vicario generali, ipso Episcopo in remotis agente.*

12 *Ed. III. A more general Writ to the Archbishop. &c. vel Vicariis vestris generalibus, vobis in partibus transmarinis agentibus.*

14 *Ed. III. T. Episcop. Hereford. vel ejus Vicario generali, ipso Episcopo in remotis agente.*

20 *Ed. III. Custodi Spiritualit. Episcop. Assaphensis, &c.*

The like we find 20 E. (3.) 34. 36. 38. 44. 5 R. (2.) 6. 7. 9. 10. 12. 13. 18. 20. 7 H. (4.) 8. 2 H. (5.) 3. 4. 5. 7. 8. 9. 2 H. (6.) 4. 5. 9. 10. 11. 15. 18. 20. 25. 29. 12 Edw. 4. In all these years, there are Writs directed, either to the Guardians of the Spiritualities in the Vacancies of the Sees, or to the Vicars-general or Chancellours in their absence beyond the Seas. Which are sufficient to prove this to have been the constant practice of Parliaments in those times.

[2.] Some Church-men were summon'd to Parla-

ib. n. 22.

Parlament who could have no pretence to sit there as *Temporal Barons*. For 49 H. III. the *Deans of York, Excester, Wells, Salisbury and Lincoln* were summon'd with the like *Writ* as the rest. And Mr. *Selden* observes, that in the times of *Edw. I. Edw. II. Edw. III.* where the Clause *Premunientes* is omitted in the *Writ* to the *Bishops*, there particular and several *Writs* were sent to some *Deans* and *Priors of Cathedral Churches*, to appear in *Parlament*.

But to prove more fully the interest the *Clergy* had then in *Parlaments*, it is worth our observing, that in the ancient *Records* there are 4 several sorts of *Writs* wherein the *Clergy* were concerned.

1. In the common *Writs of Summons* to *Parlament* sent to the *Archbishops* and *Bishops*, with the Clause of *Premunientes*, which runs thus; *Premunientes Priorum & Capitulum, or Decan. & Capit. Ecclesie vestre, Archidiaconos, totumque Clerum vestre Diocel. facientes, quod iidem Prior & Archidiaconi in propriis personis suis, ac dictum Capitulum per unum, idemque Clerus per duos Procuratores idoneos, plenam & sufficientem potestatem ab ipsis Capitulo & Clero habentes, predictis die & loco intersint, ad*
consen-

consentendum his que tunc fœdem de
 communi consilio ipsius Regni nostri,
 divina favente Clementia, contigerint
 ordinari. So Mr. Selden represents it Titles of Ho-
 nout, p. 595. from the 50 Ed. III. membr. 6. And with
 him Sir Edm. Coke agrees; who saith, by 4 Instit. p. 4.
*this Clause in the Writ of Summons to the
 Bishops, they are required to summon these
 persons to appear personally at the Parla-
 ment: but he proves they had no Voices
 there, because they are required onely ad
 consentendum, &c.* Which is a very weak
 argument. For, (1.) His own great Au-
 thority, *Modus tenendi Parlamentum*,
 saith expressely, *they were called ad trac-
 tand. & deliberand. and that their names
 were called over in the beginning of Par-
 lament; and that they had a Voice there,
 and did make up part of the Commons of
 England.* Not that the *Procuratores Cleri*
 did sit together with them, after they had
 a Speaker of their own; of which I find
 no Precedent: but they sate by themselves,
 having a *Prolocutor* of their own: which
 is the very same name used in the *Rolls*
 for the Speaker of the House of Commons.
 (2.) These words do not exclude them
 from being part of the *commune Conci-
 lium Regni*, but onely shew, that their
 Consent was required, according to the
 Custom

Custom of that time. And 23 Ed. I. the Clause is more full, *ad tractand. ordinand. & faciend.* the like 24 Ed. I. But in 27 Ed. I. the words are, *ad faciend. & consentiend.* (3.) The same argument would exclude the Commons from any Voices: for in 23 Ed. I. the Writ for chusing Knights and Burgesses ran after the same manner; *ita quod dicti milites plenam & sufficientem potestatem pro se & Commun' Comit' predict' & dicti Cives & Burgenses pro se & Commun' Civit' & Burg' tunc ibidem habeant, ad faciend' tunc quod de communi Consilio ordinabitur in premissis.* Would any man be so unreasonable to infer from hence, that the House of Commons have no Votes? The same form is used 26 Ed. I. — 30 of the same. In 5 Ed. II. it is, *ad consentiendum*, &c. 6 Ed. II. it is, *ad faciend. quod de communi Consilio contigerit ordinari.* 7 Ed. II. *ad faciendum & consentiend.* and so it continued to the 26 Ed. III. when first came in, *ad tractand. consulend. faciend.* but 44 Ed. I. it was onely, *ad consulend. & consentiend.* 46 Ed. III. it was, *ad faciendum & consentiendum his que tunc de communi Concilio Regni contigerit ordinari:* so 47 Edm. III. Which hath been the general form, ever since obser-

observed, and would exclude the *House of Commons* from any *Votes* in *Parlament*, as well as the *Clergy*.

2. There were other *Writs* of *Summons* to *Parlament* wherein the *Clause Præmunientes* was left out; and then particular *Writs* were sent to such *Deans* and *dignified Clergy-men* as the *King* thought fit. So it was not onely 49 *H. III.* but there were two *Summons* 23 *Ed. I.* and in one of them the *Clause Præmunientes* was inserted, in the other not. It was left out 25 *Ed. I.* and in one 27 *Ed. I.* and put in in another, and left out again 28. and 30. of *Ed. I.* Inserted 1 *Ed. II.* in one *Writ*, and omitted in others; and so in the 3 following years: but afterwards generally inserted, except 6 *Ed. II.* 13. 16. 18. In 5 *Ed. III.* it was omitted, and so in 6. and some few years afterwards: but then it generally obtained, that the *Clause Præmunientes* was put into the *Writs* of the *Bishops Summons* to the *Parlament*.

3. There were *Writs* of *Summons* to great *Councils*, which were no *Assemblies* of the *Estates*; and then onely some great *Bishops* and *Lords*, or other Great men were summon'd, without any *Writs* to others, or any notice taken of them. In such a

L

Sum-

Summons 2 *Ed. II.* onely 4 *Bishops* are named ; 18 *Ed. II.* onely 6 ; 19 onely 5 ; 2 *Ed. III.* onely 2. and the *Guardian* of the *Spiritualties* of the *See* of *Canterbury* : and so 4 *Ed. III.* and in another the same year, 3 besides the *Archbishop* of *Canterbury*. 5 *Ed. III.* Summons were sent to the *Archbishop* of *York*, and 19 *Bishops* more. 11 *Ed. III.* the Writ was directed to the *Archbishop* of *York*, and such *Bishops*, *Earls*, and *Great men* as were of the *King's Council* : and two more were summon'd the same year. The form of the Writ differs little from that to the *Parlament*, onely the Clause *Præmunientes* is always left out, and onely some particular *Bishops* and *Nobles* are called, and no Writs for elections of *Knights* or *Burgeses*. In the 16 *Ed. III.* the Writ is sent to the *Archbishop* and 7 *Bishops* more ; but none to *Abbots*, *Priors*, *Sheriffs*, &c. Which shews that this was *Magnum Concilium*, as it is sometimes called, but no *Parlament*.

4. There were *Writs* to summon a *Convocation* distinct from the Writ of *Summons* to the *Parlament* with the Clause *Præmunientes*. This will appear by the first Writ of *Summons* to a *Convocation*, which I have seen ; which bears
date

date at *Lincoln* 17. Feb. 9 Ed. II. but the *Parlament* was summon'd 16. of *October* before, to meet at *Lincoln* in *quindenâ S. Hilarii*; with the Clause *Præmunientes* in the Writ to the *Bishops*. In which *Summons* to *Convocation* it is expressed, that *those Bishops and others of the Clergy, who were summon'd to Parlament, did, as far as they were concerned, unanimously yield to a Subsidy*; but so, that *others of the Clergy who were not summon'd to Parlament should meet in Convocation, and consent thereto*. Therefore the King sends his Writ to the *Archbishop* to summon all the *Prelats*, whether *Religious* or others, and others of the *Clergy* of his *Province*, to meet at *London* post 15. *Pasch. ad tractand. & consentiend. &c.* Here we have the plain difference between the *Writs* to *Parlament*, and to *Convocation*. The *Writs* to the *Parlament* were sent to the *Archbishops* and all the *Bishops*, with the clause *Præmunientes*, &c. summoning those of the *Clergy* who were then thought necessary to the *Assembly of the Three Estates in Parlament*: but when a *Convocation* was called, then the *Writs* were onely directed to the *Two Archbishops*, who were to summon the rest of the *Clergy*, and not onely those who held by *Baronies*,

but others of the dignified Clergy, *tam exemptos quàm non exemptos*, with the *Proctors of the Chapters and Clergy of the Dioceſe*, *ad tractand' & conſulend' ſuper premiſſis una vobiscum & aliis per Nos tunc mittendis*. So it is expreſſed in the *Writ for Convocation* 11 Ed. III. 29 Ed. III. 31 Ed. III. 7 R. II. 28 H. VI. 23 Ed. IV. onely theſe two laſt have this difference, *ad tractand', conſentiend', conclud' ſuper premiſſis, & aliis que ſibi clariuſ expo- nentur tunc ibidem ex parte noſtra*.

Theſe things I have laid together, not barely to clear this intricate matter, (as it hath been made) of the intereſt the Clergy then had in *Parlaments* as well as *Convocations*; but chiefly to prove from hence, that all the intereſt they had in *Parlaments* was not meerly on the account of the *Temporal Baronies* which the *Biſhops* and many of the *Abbots* then had. Which is the great, but common miſtake of the *Authour* of the *Letter*.

[3.] After the *Biſhopricks* were made *Baronies*, the diſtinction even in *Parlament* is kept up between the ſeveral *Eſtates* of the Clergy and *Laiety*. For although *Baronagium* doth often take in all; yet ſometimes they are ſo remarkably diſtinguiſhed, that we may ſee they
were

were looked on as two distinct Estates in *Parlament*. So *Eadmerus*, (speaking of what passed in the *Parlament* 3 H. I.) saith, it was done *utriusque Ordinis concordia curâ & solitudine*, by the consent of ^{Eadmer. l. pag. 67.} both Estates. So *Matt. Paris*, speaking of the Summons to appear in the beginning of H. I. comprehends all under those 2 Estates, *Clerus Angliæ, & Pop. universus*: and again, *Respondente Clero, & Magnatibus cunctis*. Speaking of a *Parlament* under H. II. he saith, *Convocato* ^{Matt. Paris pag. 55.} *Clero Regni, ac Populo*. In 39 H. III. describing a *Parlament*, he calls those assembled *Nobiles Angliæ, tam viri Ecclesiastici quàm Seculares*. And in the Writs of Summons the distinction hath been always preserved between the *Prælati* and the *Magnates*: for in those to the *Bishops* it is, *cum cæteris Prælatiis, Magnatibus, &c.* in those to the *Temporal Lords*, *cum Prælatiis, Magnatibus, &c.* In those to the *Bishops* they were commanded, *in Fide & Dilectione quibus nobis tenemini*: in those to the *Temporal Lords*, *in Fide & Homagio*; or, since Ed. III. *in Fide & Ligeancia*. Which shews that they were not summon'd meerly as *Temporal Barons*.

[4.] The Authour of the Letter confesseth

pag. 86.

the Clergy to be one of the three Estates of the Kingdom; but denies them to be one of the three Estates in Parliament. From whence I argue thus. Either the Clergy must be represented in Parliament, or one of the Estates of the Kingdom is not at all represented there. And if one of the Estates of the Kingdom be not there represented, how can it be a perfect Representative? So that this distinction of the Three Estates of the Kingdom, and the Three Estates in Parliament, unavoidably overthrows the Parliament's being a compleat Representative. But in 23 H. VIII. n. 33. as Mr. Petyt observes, there is this passage in the Parliament-Rolls. It is considered and declared by the whole Body of this Realm, now represented by all the Estates of the same assembled in this present Parliament. Therefore all the Estates of the Kingdom must be represented in Parliament. And 1 Eliz. c. 3. The Lords Spiritual and Temporal and the Commons are said to represent in Parliament the Three Estates of the Realm. From whence it follows, that, according to the sense of the Parliament, if the Clergy be an Estate of the Kingdom, as he saith they are, they must be represented in Parliament,

The ancient
Right of the
Commons,
pag. 61.

or

or the whole Body of the Realm cannot
be there represented.

(2.) We now come to consider the weight of *Authority* in this matter. For which I shall premise two things.

1. That the whole *Parlament* assembled are the best Judges, which are the *Three Estates in Parlament*; and their *Authority* is more to be valued, then that of any particular Persons, whether *Lawyers*, or others.

2. That no *Parlaments* can give better Testimony in this matter, then those which have assumed most to themselves. For if there be *Three Estates in Parliament*, and the *Bishops* be none, then the *King* must be one of the *Three*; as the *Authour* of the *Letter* insinuates, throughout this discourse: and the natural consequence from hence seems to be a *coordination*; or that two joyning together may over-rule the third. Therefore in all Reason, if any *Parlaments* would have made the *King* one of the *Three Estates*, it would have been either the *Parlament* I *H. IV.* which deposed one *King*, and set up another; or that I *R. III.* which disinherited the Children of *Ed. IV.* and set up their Uncle.

I shall therefore first from the *Rolls* of
L 4 these

these two *Parlaments* shew, which are the *Three Estates in Parliament*; and from them, evidently prove that the *King* is none, but the *Bishops* are the *Third Estate*.

I begin with the Parliament 1 *H. IV.* By the *Rolls* it appears, (1.) That *R. II.* appointed two Procurators to declare his Resignation of the Crown, *coram omnibus Statibus Regni*, before all the States of the Kingdom. From whence it unavoidably follows, 1. that the King was none of them; 2. that the Estates of the Kingdom and the Estates in Parliament are the same thing. (2.) Among the Articles against *R. II.* one is concerning the Impeachment of *Tho. Archbishop of Canterbury coram Rege & omnibus Statibus Regni*, before the King and all the Estates of the Realm. The King then was none of the Estates. (3.) The Commissioners for the sentence of Deposition are said to be appointed *per Pares & Proceres Regni Anglie Spirituales & Temporales, & ejusdem Regni Communitates, omnes Status ejusdem Regni representantes*; by the Peers and Lords Spiritual and Temporal, and the Commons of the Kingdom, representing all the States of the Kingdom. Where observe,

serve, 1. The *Bishops* are called *Peers*, as well as the *Temporal Lords*. 2. The *Estates* of the *Parlament* are to represent all the *Estates* of the *Kingdom*. 3. The *Three Estates* in *Parlament* are the *Lords Spiritual*, the *Lords Temporal*, and the *Commons* of the *Realm*; and *Fabian* expressly calls them the *Three Estates* of this present *Parlament*, representing the whole *Body* of the *Realm*. Fabian. 7.
par. R. 2.
fol. 158.

In the *Rolls* of *Parlament* 1 R. III. it is recorded, that before his *Coronation*, certain *Articles* were deliver'd unto him in the name of the *Three Estates* of the *Realm* of *England*, that is to say, of the *Lords Spiritual* and *Temporal* and of the *Commons* by name, &c. Now forasmuch as neither the said *Three Estates*, neither the said *Persons* which in their name presented and deliver'd (as it is afore said) the said *Roll* unto our said *Sovereign Lord* the *King*, were assembled in form of *Parlament*, divers *Doubts* have been moved, &c. Now by the said *Three Estates* assembled in this present *Parlament*, and by *Authority* of the same, be ratified, and enrolled, &c. Upon which *Mr. Pryn* himself makes this *Marginal Note*, *The Three Estates must concur to make a Parliament; no one or two of them being a full or real Parliament, but all conjoyned.* Abridgment
of Records,
pa. 710. 714.

But

But lest I should seem to take advantage onely of these *two Parlements*, I shall now shew this to have been the constant sense of the *Parlements*; as will appear by these following *Records*.

In 1 *H. VI. n. 12.* All the *Estates of the Realm* are said to be assembled in *Parlament*. 3 *H. VI. n. 19.* the *Three Estates* assembled in this present *Parlament*.

6 *H. VI. n. 24.* the *Duke of Gloucester* desired an explanation of his *Power as Protector*: in the Answer, drawn up by the Lords appointed for that purpose, it is alledged that *H. V. could not by his last Will, nor otherwise, alter, change, or abrogate, without the Assent of the Three Estates*; nor commit or grant, to any Person, Governance or Rule of this Land, longer then he lived. Nevertheless they adde, It was advised and appointed by the Authority of the King, assenting the *Three Estates of this Realm*. Which shews how far the King was from being thought one of the *Three Estates in Parliament* at that time.

10 *H. VI. n. 17.* Ralph Lord Cromwell put in a Petition to the *Parlament*, that he was discharged the Office of King's Chamberlain in a way contrary to the Articles for the Council sworn 8 *H. VI. coram tribus*

tribus Regni Statibus, before the Three Estates of the Realm, as they were assembled in Parliament: which appears by the Record 8 H. VI. n. 27.

11 H. VI. n. 10. The Duke of Bedford appeared in Parliament, and declared the Reasons of his coming coram Domino Rege & tribus Regni Statibus, before the King and the Three Estates of the Realm; as it is in the Record, but not mention'd in the Abridgment.

n. 11. Domino Rege & tribus Regni Statibus in presenti Parlamento existentibus, the King and the Three Estates of the Realm being present in Parliament. Nothing can be plainer, then that the King is none; and that the Three Estates of the Kingdom are the Three Estates in Parliament.

11 H. VI. n. 24. Lord Cromwell Treasurer exhibits a Petition in Parliament, wherein he saith, the estate and necessity of the King and of the Realm have been notified to the Three Estates of the Land assembled in Parliament.

In an Appendix annexed to the Rolls of Parliament that year, the Duke of Bedford saith, in his Petition to the King, how that in your last Parliament yit liked your Highness, by youris of Three Estates

Estates of yis Land, to will me, &c.
23 H. VI. n. 11. *Presente Domino Rege, & tribus Regni Statibus in presenti Parlamento existentibus, &c.*

28 H. VI. n. 9. *Domino Rege & tribus Regni Statibus in pleno Parlamento comparentibus, &c.*

pag. 86.

After these I shall insist upon the *Precedents* cited by the *Authour* of the *Letter* himself; viz. the *Ratification of the Peace with France by the Three Estates* 9 H. V. and 11 H. VII. which he alledges as an extraordinary thing, that the *Three Estates joyned in these Transactions*: whereas in truth it was nothing but a *Ratification of the Peace in Parliament*; and consequently, those *Three Estates of the Kingdom*, are the *Three Estates of Parliament*. For

Bacon H. 7.
pag. 144.

Hist. Angl.
pag. 404.

the Parliament was then sitting at both these *Ratifications*; and no other Assembly of the *Three Estates* was ever known in England. *Walsingham* saith, that H. V. called a *Parliament*, which was sitting at that time: for the King kept *S. George's Feast* at *Windsor* that year, from thence he went to the *Parliament* at *London*, which ended within a *Month*; and the *Ratification of the Peace* bears date *May 2*. Judge then, whether these were not the *Three Estates in Parliament*? But

to

to prove this more fully. It seems by 23 H. VI. n. 24. that a Statute was made in the time of H. V. that no Peace should be made with France without the consent of the Three Estates of both Realms; which was then repealed. But whom they meant by the *Three Estates* here in the time of H. VI. appears by 28 H. VI. n. 9. when the Chancellour, in the presence of the King, gave thanks to the Three Estates, and prorogued the Parliament: where it is plain, the Three Estates in Parliament were meant, and that the King could be none of them. In 38 H. VI. n. 38. the Chancellour again, in the presence of the King and of the Three Estates, having given thanks to all the Estates, dissolved the Parliament. But that which puts this matter out of doubt is, that in the Parliament 1 H. VI. the Queen Dowager in her Petition mentions the Ratification made in Parliament 9 H. V. and saith, it was not onely sworn by the King, but by the *Three Estates* of the Kingdom of England: *Cest assavoir, les Prelatz, Nobles, & Grands, & per les Comuns de mesm le Roialm Dengleterre*; that is to say, by the Prelats, Nobles, and other Grandees, and by the Commons of the Realm of England: as appears more fully,
saith

saith that Petition, by the *Records* and *Acts* of the said *Parlament*. And the King there declares in four several Instruments, that the said Articles of Peace were approved and ratified by *Authority* of *Parlament*, in these words; *Qui quidem Pax, Tractatus, conclusio & concordia, omnesq; Articuli contenti in eisdem, in Parlamento dicti Patris nostri apud Westm. 2^o die Maii A. R. 9. tento, Auctoritate ejusdem Parlamenti approbati, laudati, auctorizati & acceptati.* Nothing can be plainer from hence, then that the *Three Estates of the Kingdom* were no other then *the Three Estates in Parliament*. And the same appears by another Petition of the same *Queen*, 2 H. VI. n. 19.

For latter Times I shall instance onely in the *Parlament* 1 Eliz. c. 3. wherein the *Lords Spiritual and Temporal and Commons* declare, that they do represent in *Parlament* the *Three Estates of the Realm*. From whence it follows, 1. That the *Three Estates of the Kingdom* must be represented in *Parlament*. 2. That the *Lords Spiritual and Temporal and the Commons* do represent *those Three Estates of the Kingdom*, and therefore are the *Three Estates in Parliament*. 3. That the
King

King can be none of the *Estates in Parliament*, because he doth not represent any of the *Estates* of the *Kingdom*.

And it is a wonder to me, that any man, who considers the *Constitution* of the *Government* of *Europe*, and how agreeable it was in all the *Kingdoms* of it, as to the *Assemblies* of the *Three Estates*, could ever take the *King* to be one of the *Three Estates in Parliament*. For the Question would seem ridiculous to persons of any other Nation, if we should ask them whether the *King* was reckon'd among the *tres Ordines Regni*? For by the *Three Estates* they all mean the *Three Ranks* of men, the *Clergy*, *Nobility*, and *Commonalty*. But the *Authour* of the *Let-* pag. 88.
ter could not deny that *these were the Three Estates of the Kingdom*; but he saith, *the Three Estates of Parliament are clean another thing*: which I may reasonably suppose, is sufficiently disproved by the foregoing Discourse.

But he quotes several *Authorities* for what he saith, which must now be examined, and will appear to be of no weight, if compared with the evidence already given on the other side.

The first *Authority* is of *King James*, in his *Speech at the Prorogation of the Par-* pag. 98.
liament

(172)
lament 1605: wherein he saith, *the Parliament consists of a Head, and a Body; the King is the Head, the Body are the Members of the Parliament. This Body is subdivided into two parts, the Upper, and the Lower House. The Upper consists of the Nobility and the Bishops; the Lower of Knights and Burgeses.* The force of the Argument lies in *King James* his making the *Bishops* but a *Part of the Upper House*: but that this doth not exclude their being a *Third Estate*, I prove by a Parallel Instance. In 5 H. IV. the *Bishop of London*, being *Chancellour*, compared the *Parliament* to a *Body*, as *King James* did; but he made the *Church* the *Right Hand*, the *Temporal Lords* the *Left Hand*, and the *Commonaltie* the other *Members*; yet presently after, he calls these, *the several Estates which the King had called to Parliament.* But that the *Bishops* sitting in the *same House* with the *Temporal Lords* doth not hinder their being a *distinct Estate*, will appear, when we come to answer his *Reasons.* And for *King James* his sense as to this matter, we may fully understand it by this passage in his *Advice to his Son.* *As the whole Subjects of our Countrey (by the ancient and fundamental Policy of our Kingdom) are divided into Three*

Rasilic. Dor.
l. 2. p. 159.
of his Works.

Three Estates, &c. These words are spoken of the *Kingdom of Scotland*; but the *ancient and fundamental Policy* of that is the same with *England*; and he that believed *the Subjects made the Three Estates* there, could never believe the *King* to be one of them here.

The next *Authority* is of *King Charles I.* pag. 100. in his *Answer to the 19 Propositions* June 2. 1642. wherein he tells the two *Houses*, that neither one *Estate* should transact what is proper for two, nor two what is proper for three. To which I answer, that the *Pen-ner* of that *Answer* was so intent upon the main business, viz. that the two *Houses* could doe nothing without the *King*, that he did not go about to dispute this matter with them, whether the *King* were one of the *Three Estates* or not; but taking their supposition for granted, he shews that they could have no *Authority* to act without the *King's concurrence*. But the unwary *Concessions* in that *Answer* were found of dangerous consequence afterwards, when the *King's enemies* framed the *Political Catechism* out of them; which is lately reprinted, no doubt, for the good of the *People*.

In 2 H. IV. n. 32. he makes the *House* pag. 101. of *Commons* to declare to the *King* and

M

Lords,

Lords, that the Three Estates of the Parliament are the King, the Lords Spiritual, and Temporal. Whereas the truth of that matter is this: A difference had happen'd in the *House of Lords*, between the *Earl of Rutland* and *Lord Fitz-Walter*; whereupon the *House of Commons* go up to the *King* and the *Lords*, and having, it seems, an *Eloquent Speaker*, who ventured upon dangerous *Metaphors*, he makes bold with the *Similitude* of the *Trinity*; because that would help him to perswade them to *Unity*: but if he had left the *King* out, he might have been suspected to have set up an *Independent Power* in the *Three Estates*: therefore lest he should lose his *Similitude*, (which goes a great way with an eloquent man) he strains another point, and draws the *King* into his *Trinity*. And is such an expression to be mention'd in comparison with the express Declaration but the year before, 1 H. IV. of both *Houses* concerning the *Three Estates in Parliament*?

Next to this *Similitude*, that of *Stephen Gardiner* ought to be mention'd; who compar'd *Faith, Hope, and Charity*, concurring to *Justification*, to the concurrence of the *Three Estates in Parliament*, i. e. the *King* and two *Houses*, to the making of
Laws.

Laws. But I wonder the *Author* of the *Letter*, who expresseth so much dislike of his *Divinity*, would take his *Judgment* in *Politicks*. But this notion of making the *King one of the Three Estates*, how valuable soever it be to some men, is, it seems, onely to be met with in some grave ancient *Similitudes*. But of what *Authority* these are, against the constant sense of *Parlaments* so fully declared, I leave any man of understanding to judge.

For the judgment of *eminent Lawyers*, pag. 103. he quotes but one in *King James* his time, viz. *Finch in his Book of Law*, l. 2. ch. 1. who doth indeed, in the words quoted by him, *make the King, Lords and Commons to be the Three Estates*. But I can hardly imagine how a *learned Lawyer* could fall into such a gross mistake, unless the *Modus tenendi Parliamentum* should give the occasion to it; which was accounted *no blind M.S.* in those days, but a very great Treasure, as appears by *Sir E. Coke*, who cites it on all occasions. And very few Lawyers had the judgment in *Antiquity* which *Mr. Selden* had, who first discovered the just Age and Value of that *M.S.* This *Author* indeed, towards the conclusion of his *Treatise*, makes the *King the first of the Estates*: but then he

makes *Six Estates in Parliament, or Degrees*, as he calls them ; and delivers this for good doctrine at the very end of his *Treatise*, that if any one of all these be *summon'd*, and do not appear, yet, with him, it is notwithstanding a full *Parlament*: nay, he expressly saith, *the King may hold a Parliament without a House of Lords*. But there are so many other such Positions discover'd by others in that *Treatise*, that I need to say no more of it. And as to this point of the *King's being one of the Estates in Parliament*, Sir Ed. Coke, who otherwise too much admired that *Treatise*, declares against it, in the very beginning of his *Treatise of the Parliament*. This *Court*, saith he, *consisteth of the King's Majesty, sitting there as in his Royal Politick capacity; and of the Three Estates of the Realm; viz. of the Lords Spiritual, Archbishops and Bishops, the Lords Temporal, and the Commons of the Realm*. And however the *Authour* of the *Letter* may slight Mr. *Selden's* Judgment in this matter ; yet these two may be sufficient to weigh down the *Scales* against any one *Lawyer's Authority* to the contrary; especially, since they were never suspected, I dare say, for any *partiality* towards the *Clergy*.

(3.) Bnt the *Author* of the *Letter* thinks to carry this point by meer strength of *Reason*. We must therefore diligently consider the force of his Arguments.

I. If *Bishops* were one of the *Estates* in pag. 89. *Parlament*, *Reason* would they should vote by themselves separately from other *Lords*, which would make another *Estate*: But they do not onely not vote apart by themselves, the whole *Body* of them together; but that *Body* is divided and separated within it self, one part from another. If both *Houses* ever sate together, as some imagine, (and as they do in a neighbour Kingdom,) this way of Reasoning will make but one *Estate* in *Parlament* all that time. But to give a clear answer to this objection; I distinguish two things in the *Bishops*, their *Spiritual Capacity*, by which they represent; and their *Civil Capacity* as *Barons*, in which they vote, according to the *Rules* of the *House*. For, the manner of giving their *Votes* is a thing under the *Regulation* of the *House*, and depends upon *Custom*; but their *Spiritual Capacity* as *Bishops*, in which they represent, doth not. And the Reason of their sitting together with other *Lords*, is upon the account of their *Writs* of *Summons*; which, as *Mr. Selden* confesseth,

ever since the latter end of *Edm. III.* hath been, for the *Bishops cum ceteris Prelatis, Magnatibus & Proceribus*, colloquium habere & tractatum: and therefore they are bound to sit together in the same place with the *Temporal Lords*, or else they cannot advise and confer together. And I leave the *Authour* of the *Letter* to consider, whether his *Reason*, or the *King's Writ*, ought to take place.

pag. 89.

2. If the *Bishops* were a *Third Estate*, they must have a *Negative voice* to all that passeth there: But the *Bishops* are intermingled with the *Temporal Lords* in making up the *Majority*, as a part of it. Since I have evidently proved the *Clergy* to be one of the *Three Estates in Parliament*, if he be sure that every *Estate* ought to have a *Negative voice*, then I am sure that this *Objection* lies more upon him to answer, then upon the *Bishops*. But to prevent any new disputes, I shall return this Answer to it. Since it is agreed on both sides, that the *Bishops* do sit in the *House* as *Temporal Barons*, and in that respect do make up the *Majority of Votes* in the *House of Lords*; it could not but seem unreasonable, that they who voted as *Barons* in the *House* should have a *Negative voice* in another capacity: and by this

this means they lost their distinct *Negative voice*, because by the *King's Writs* they were to sit and vote with the *Temporal Lords*. Just as it is in the *Diets of Germany*: Since the distribution of that *Assembly of the Estates of the Empire* into the several *Chambers*, the *Prelates* vote according to their *Ranks*: the *Three Electors* in the *Electoral College*; the other *Bishops*, that are *Princes of the Empire*, in the *Chamber of Princes*; and those who are not *Princes*, with the *Counts and Barons*. So that here the *Votes* of the *Bishops* are mingled with the rest, without a distinct *Negative voice*; and yet no one questions but the *Bishops* do represent a distinct *Estate of the Empire*.

3. This is a disparagement to the House of Lords, that another Estate must be joyned with them to make up their *Negative*. No more, then to the *Princes of the Empire*, to have the *Bishops* joyned with them, when the *Imperial Cities* vote by themselves. But what disparagement is this, for those to make up the *Majority of the Votes* of the *Baronage*, who sit there as *Barons by Tenure*, by a *Right* as ancient as *Will. the Conquerour*, by the *Author's* own confession?

4. If the *Bishops* make a *Third Estate*, pag. 91.

then a Parliament could not be held without them: But a Parliament hath sate exclusive Clero, as that of Ed.I; and that it may do so in point of Law, appears by the Resolution of the Judges in Keilway's Reports, because the Bishops sit in Parliament by reason of their Baronies. This is the great Objection, to which I shall give a full Answer.

[1.] It is dangerous arguing from extraordinary Cases to the excluding any one of the Estates of the Kingdom from being represented in Parliament: because no one can tell where this way of arguing will stop. If a Parliament may be good without one Estate, why not without another? And we have seen an House of Lords excluded as unnecessary, upon such kind of arguments; because they sit in their own Persons, and represent none but themselves. If we once depart from the ancient and legal Constitution of Parliaments, there will be no end of Alterations. Every new Modeller of Government hath something to offer that looks like Reason, at least to those whose interest it is to carry it on. And if no Precedents can be found, when they appeal to a certain invisible thing called the Fundamental Contract of the Nation: which being a thing no where to be found, may signify

signify what any one pleaseth. Suppose one extraordinary case happens through the disorder of Times, *that the Clergy have been left out in a Parliament*; what doth this signify towards altering the *legal Constitution* and constant *Course of Parliaments*, which from the beginning of *Parliaments* in this Nation, have had the *Estate* of the *Clergy* represented in them? as sufficiently appears by Mr. Petyt's learned Preface to his late Discourse of the *ancient Right of the Commons*. The first pag. 7. &c. after King Ethelbert's Conversion was, *Commune Concilium tam Cleri quàm Populi*. That under Ina was, *omnium Episcoporum, & Principum, Procerum Comitum, & omnium Sapientum Seniorum & Populorum totius Regni*. That under Edmund the Elder was, *Concilium magnum Episcoporum, Abbatum, Fidelium Procerum & Populorum*. I might adde many more: as that at Beccancel under King Withred Concil. Brit. p. 182. 189. A. D. 694. *Episcopis, &c. Ducibus & Sa-* 318. 327. *trapis in unum glomeratis*. At Clovesho 336. 340. under Kenulphus of Mercia; at Calecyth, 344. 428. at London, at Kingston. Nay, not one 534. can be found by me in the Saxon times, wherein the *Bishops* are not expresly mention'd. So that if there be such a thing to be found as the *Fundamental Contract*

of

of the Nation about the Constitution of Parlements, I do not question but they have their share in it. Inſomuch that Sir H. Spelman makes it his deſcription of the *Wittena-Gemot*, that in it, as Mr. Petyt obſerves, *Convenère Regni Principes, tam Epifcopi quàm Magiſtratus, liberique homines*; i. e. it was an *Assembly of the Three Eſtates*. So that before there were any ſuch things as *Baronies*, they were an eſſential part of the *Engliſh Parliament*. And muſt all this clear and undoubted evidence from the firſt mention of *Parlements* be rejected, becauſe once upon a time, a certain King called a certain *Parlament*, wherein, upon ſome Diſtaſt between the King and the *Clergy*, the other *Eſtates* continued ſitting without them?

[2.] This ſingle Inſtance about the *Parlament* under *Ed. I.* is much miſunderſtood, as will appear by theſe conſiderations.

I. That the *Clergy* excluded themſelves, and were not ſhut out by the *Act* of the King and the other *Eſtates*. For upon the *Bull* of Pope *Boniſace VIII.* forbidding the *Clergy* giving any more Subſidies, (which was procured by *Archbiſhop Wincheſſee*, as our Hiſtorians relate) a *Parlament* being called by *Ed. I.* at *Saint Edmondsbury* on purpoſe for *Subſidies*, the
Clergy

Clergy refuse, upon the Pope's prohibition, till they had consulted the Court of Rome; and go away every one to their own homes: notwithstanding which, the King proceeds with the other two Estates, and gets Subsidies from the Laiety. So that the exclusion of the Clergy came from their own voluntary Act; when the King desired no such thing, nor the other two Estates, but were all extremely provoked at this withdrawing of the Clergy. That this Parliament was called purposely for the Subsidy, appears by the Writ still upon Record; wherein the Archbishop is summon'd to appear, ad ordinandum de quantitate & modo subsidii memorati.

Clauſ.

24 Ed. 1.

M. 7. dorſo.

2. Whereas it is insinuated, *that great matters were done, and good Laws passed, when the Clergy were excluded; I find no such thing. It is true, the confirmation of Magna Charta by Ed. I. (which was a great thing indeed) is said, in the Statute-Books, to be done the same year, viz. 25 Ed. I. But that it could not be done in that Parliament, I thus prove. That*

Parliament was called crast. Animarum; the King appoints another at London crast. Hilarii: where the difference still continuing, he appoints a new Parliament on the day of S. Peter ad Vincula, or Lammas-

Walsingham.

pag. 18.

Thorn. ad

A. 1296.

Knighton,

p. 2491.

Matt. West.

day, pag. 428.

day, wherein he was reconciled to the Archbishop and Clergy. Then Fealty is sworn to his Son, before his going into Flanders; and the King excused himself as to the great Taxes and Subsidies, on the account of his Wars. While he was about Winchelsea, a Remonstrance is sent to him of the Grievances of the Nation, in the name of the Archbishops, Bishops, Earls, Barons, and the whole Commons of England, wherein they complain of illegal Taxes, and the breach of Magna Charta. The King gives a dilatory answer, and passes over into Flanders. In his absence the People refuse to pay the Taxes, and the Lords combine together, and all things tend to an open Rebellion. His Son Ed. II. calls a Parliament at London, and promises a Confirmation of the Charter, and that no Taxes should hereafter be raised, either on Clergy or Laiety, without their consent. Which being sent over, Edw. I. confirmed it with his own Seal: which was all done within the compass of this year. But he again ratified it in the Parliament 27 Ed. I. So that nothing was done in that Parliament at S. Edmondsbury, but granting a 12th of the Laiety to the King. And when the great Laws were passed, the King and
Clergy

Clergy were reconciled, and they sate in Parliament. And the Archbishop of Canterbury fell into the King's displeasure afterwards, for being so active a promoter of them. The summe then of this mighty argument is, *that the Lords and Commons once granted their own Subsidies, without the concurrence of the Clergy*; therefore the Clergy are no essential part of the Parliament.

3. The Reason assigned in *Keilway's Reports*, why the King may hold a Parliament without the Bishops, is very insufficient: *viz. because they have no place in* pag. 92. *Parliament by reason of their Spirituality, but by reason of their Temporal possessions.* The insufficiency of which Reason will appear by two things.

1. That it is not true: as appears by this, that the Clergy are *one of the Estates of the Kingdom*; and all the *Estates* of the Kingdom must be represented in Parliament.

2. Were it true, it is no good Reason. For why may they be excluded *because they sit on the account of their Baronies*? Where lies the force of this Reason? Is it because there will be Number enough without them? That was the *Rump's* Argument against the *Secluded Members*.

And

And I hope the *Authour* of the *Letter* will not justify their Cause. Or is it because they hold their *Baronies* by *Tennure*? So did all the ancient *Barons* of *England*: and why may the King hold his *Parlament* with the other *Barons*, without the *Bishops*; and not as well with the *Bishops*, without the other *Barons*? Which I do not see how it can be answer'd upon those grounds. Suppose the Question had been thus put, Since all the ancient *Lords of Parlament* were *Barons* by *Tennure*, and *Parlaments* were held for many Ages without any *Barons* by *Patent* or by *Writ*, why may not the King hold his *Parlament* after the ancient way, onely with *Barons* by *Tennure*? I do not see, but as good a Reason may be given for this, as that in *Keilway's Reports*. All that I plead for is, that our good ancient and legal Constitution of *Parlament* may not be changed for the sake of any single *Precedents*, and rare *Cases*, and obscure *Reports* built upon weak and insufficient Reasons. For, as the *Authour* of the *Letter* very well saith, *Consuetudo Parliamenti est Lex Parliamenti*, *The constant Practice of Parlements* (and not one single Instance) *is the Law of Parlements*. And suppose that *Precedent* of 25 Ed. I.

as

as full as could be wished in this case; yet
 I return the answer of the *Authour* of the *pag. 49.*
Letter in a like case, *This is but one single*
Precedent, (of a *Parlament* without *Bi-*
shops,) *against multitudes wherein they*
were present : *it was once so, and never but*
once. And can that be thought sufficient
 to alter and change the constant course and
 practice of *Parlaments*, which hath been
 otherwise ?

Nothing now remains, but a severe
 reflexion on the *Popish Bishops* for opposing
 the *Statute of Provisors*, and the several *pag. 96.*
good Acts for the *Reformation*. But what
 this makes against the *Votes of Protestant*
Bishops is hard to understand. If he
 thinks those could not make a good *Third*
Estate in Parlament, who took Oaths to
 the *Pope* contrary to their *Allegiance*, and
 the interest of the Nation, so do we. If
 he have a great zeal for the *Reformation*,
 so have all true Members of the *Church of*
England, who, we doubt not, will hear-
 tily maintain the *Cause* of our *Church* a-
 gainst the *Usurpations* of *Rome*, though
 the heat of others should abate. For did
 not our *Protestant Bishops* seal the *Refor-*
mation with their *Bloud*, and defend it
 by their admirable *Writings* ? What
Champions hath the *Protestant Religion*
 ever

ever had to be compared in all respects with our *Cranmer, Ridley, Jewel, Bilson, Morton, Hall, Davenant*, and many other *Bishops* of the *Church of England*? And notwithstanding the hard fortune *Archbishop Laud* had in other respects, not to be well understood in the Age he lived in; yet his enemies cannot deny his *Book* to be written with as much strength and judgment against the *Church of Rome*, as any other whatsoever. I shall conclude with saying, that the *Clergy* of the *Church of England* have done incomparably more Service against *Popery*, from the *Reformation* to this day, then all the other *Parties* among us put together: And that the *Papists* at this time wish for nothing more, then to see men, under a pretence of *Zeal* against *Popery*, to destroy our *Church*; and while they cry up *Magna Charta*, to invade the legal Rights thereof, and thereby break the first Chapter of it; and from disputing the *Bishops* presence in *Cases Capital*, to proceed to others; and so by degrees to alter the *ancient Constitution* of our *Parlements*, which will unavoidably bring *Anarchy* and *Confusion* upon us: from which, as well as *Popery*, Good Lord, deliver us.

T H E E N D.

